AN

ANALYSIS

OF THE

ROMAN CIVIL LAW;

IN WHICH

A COMPARISON

IS, OCCASIONALLY, MADE BETWEEN THE

ROMAN LAWS

AND THOSE OF

ENGLAND:

BEING THE

HEADS

OF A

COURSE OF LECTURES,

PUBLICKLY READ IN THE

UNIVERSITY OF CAMBRIDGE.

THE THIRD EDITION.

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TO THE LORD ARCHBISHOP OF CANTERBURY.

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M. DCC. LXXIX.

Si quam habet Philoſophia dignitatem (habet autem opinione maximam), ea omnis tranſlata fuit in JURISPRUDENTIAM ROMANORUM, qui partum Armis Imperium Juris Commercio, Legumque Majeſtate, continuerunt. Quicquid enim a Græcis Philoſophis de Honeſto et Juſto; de Finibus Bonorum et Malorum; de Legibus et Republicâ, quæſtionibus infinitè propoſitis, et ambitioſis magis quam utilibus diſceptationibus, effundebatur; totum collectum fuit a Juriſconſultis Noſtris, atque, nugis excuſſis, traductum in Urbem: ut quod apud Græcos exercitatio erat ingenii, longioriſque ocii levamen, Romæ, in CORPUS JURIS CIVILIS converſum, PUBLICÆ AC PRIVATÆ SEMEN ESSET UTILITATIS.

GRAVIN. Præf. ad Orig. J. C.

TO HIS GRACE

THE

DUKE OF GRAFTON,

CHANCELLOR

OF THE

UNIVERSITY OF CAMBRIDGE.

May it pleaſe your GRACE,

MY particular ſtation in the Univerſity gives me a kind of right to intrude into Your GRACE'S preſence, and offer to Your candid but judging eye theſe proofs of my diligence at leaſt in the diſcharge of an office, which I am proud to owe to Your GRACE's goodneſs.

 Truly

DEDICATION.

Truly noble minds are moved ever in perfect harmony, and feel the virtuous ſentiments of each other. Permit me to boaſt before Your GRACE of another very diſtinguiſhing obligation, moſt generouſly conferred on me by That GREAT PRELATE, to whoſe good heart it is a recommendation irreſiſtible, to be known to partake of Your GRACE's favour.

I am, My Lord,

Your GRACE's moſt obliged

TRIN. HALL.
1 Nov. 1774.

and moſt dutiful Servant

S. HALLIFAX.

PREFACE.

IT is no ſmall recommendation of the Roman Civil Law, as it was reformed in the ſixth century after Chriſt by the Eaſtern Emperor Juſtinian, that the general principles of it are delivered *ſyſtematically*. In the Digeſts, Code and Novels, which contain the Reſponſes of the Roman Lawyers and the Conſtitutions of the Roman Emperors, an exact and methodical diſtribution is not always ſtrictly regarded: but another work was prefixed to theſe, and confirmed by the authority of an Imperial Sanction, in which the elements of Juriſprudence are diſpoſed in a didactic form, its chief and leading objects are explained in a regular

ſeries, and the whole arranged in ſuch a way, as neither to oppreſs the ſtudent with a multitude and variety of matter, nor yet to leave him deſtitute of any neceſſary helps to facilitate his progreſs in legal knowledge.* No ſuch treatiſe is extant concerning the laws of our own country; and even the Commentaries of Mr. Juſtice BLACKSTONE, excellent as they are, are ſtill but the work of a private man, and without the ſtamp of public authority.

The book here alluded to is commonly known by the name of the INSTITUTIONS of Juſtinian; which, as the Proemium to them ſets forth, were compoſed in order to teach the *rudiments of law*, and were divided ſo as to contain the *elements of all legal ſcience*.† This Book, together with ſuch portions of the Digeſts and Novels, as were neceſſary to make the ſyſtem of Roman Law complete, it is the buſineſs of the following Analyſis to unfold: And whatever other defects are to be found in it,

* *Incipientibus nobis exponere Jura Populi Romani, ita videntur tradi commodiſſime, ſi primo, levi ac ſimplici via, poſt deinde, diligentiſſima atque exactiſſima interpretatione, ſingula tradantur. Alioqui, ſi ſtatim ab initio rudem adhuc et infirmum animum ſtudioſi multitudine atque varietate rerum oneraverimus; duorum alterum, aut deſertorem ſtudiorum efficiemus, aut cum magno labore, ſæpe etiam cum diffidentia, quæ plerumque juvenes avertit, ſerius ad id perducemus, ad quod, leviore via ductus, ſine magno labore, et ſine ulla diffidentia, maturius perduci potuiſſet.* I. 1. 1. 2.

† *Prima legum cunabula. In quatuor libros eaſdem Inſtitutiones partiri juſſimus, ut ſint totius legitimæ ſcientiæ prima elementa,* Proem. § 3, 4.

it, and however ill the deſign itſelf may be executed, one advantage at leaſt it is ſure of, which in ſuch a treatiſe is far from being inconſiderable, that it is planned after the beſt model.

But beſides a regular Analyſis of the Civil Law, which conſtitutes the main deſign of the enſuing work, there is a ſecond, which is ſubſidiary to it, and may perhaps by ſome be thought the moſt uſeful as well as intereſting of the two, namely, the Compariſon, which is, occaſionally, made between the Roman Laws and thoſe of England. Something of this ſort was undertaken in the laſt century by the learned Dr. COWELL, Profeſſor of Civil law in the Univerſity of Cambridge, in a Latin work, entitled *Inſtitutiones Juris Anglicani*, expreſſly compoſed and digeſted after the method and ſeries of the Imperial Inſtitutions. But beſides that a ſcheme ſo forced and unnatural as that of reducing, throughout, the municipal laws of any one country to the model of thoſe of any other, could not but be in its original extremely defective, much of the work here mentioned is now rendered uſeleſs, and to a common reader unintelligible, by the abolition of the Feudal Tenures, with an account and explanation of which a conſiderable portion of Dr. COWELL'S volume abounds: I could not therefore reap the fruit I expected and hoped for from this performance. The Compariſon

I have aimed at is of a very different nature; and was made to ſerve the following, among other, important purpoſes: firſt, to point out any remarkable agreement or diſagreement between the two ſyſtems, as often as either of theſe happened to occur; ſecondly, to ſhew in how many inſtances the Engliſh law is plainly built on and borrowed from the Roman; and thirdly, to teach the younger part of my hearers how much that limited authority, delegated by our laws to the firſt magiſtrate of a free people, is to be preferred to the uncontroulable power, uſurped and exerciſed by a lawleſs deſpot;* from whence they may be able to form

* Lord Lyttelton, in his uſeful Hiſtory of Henry II. relates a curious Anecdote from Giannoni [l. xii. c. 1.] with reſpect to the doctrine of the Imperial law, on this point of abſolute power; which it may not be without its uſe to tranſcribe. "The "Emperor Frederic, ſurnamed Barbaroſſa, greatly favoured "the Profeſſors of the Civil law, and conſulted them in the moſt "important deliberations. Unhapily for him, one of theſe "doctors, named Martin, maintained a theſis at Roncaglia againſt "another, named Bulgarius, in which he aſſerted, that the Roman "Emperor was, by right, the abſolute maſter of the whole world, "and of all the goods of particulars, ſo that he might diſpoſe of "them at his pleaſure. This moſt abominable doctrine he drew "from ſome parts of the Imperial laws, and particularly from ſome "words of Ulpian ill underſtood. But though his adverſary, who "was profeſſor of the Civil law at Piſa, endeavoured to vindicate "that law from the imputation of ſo deſtructive a principle, the "flattering doctor prevailed: his opinion was confirmed by a ma"jority of profeſſors, and Bartolus, one of the moſt celebrated com"mentators on the books of Juſtinian, declares it to be a *hereſy* to "contradict or deny it. In conſequence of this judgment, Frederic "ſet up ſuch claims of deſpotic authority, as to raiſe in the Lom"bards, and other people of the empire, ſuch an alarm for their "liberties, as proved very troubleſome and dangerous to him." Lyttelton, Book II. p. 206. Vol. III. 8vo. Ed. But notwithſtanding the opinion of Bartolus, ſo dogmatically advanced, I own

form a juſt idea of the pre-eminence and ſuperiority of our own conſtitution to that of Imperial

own that for myſelf I am ſtrongly inclined to favour the Bulgarian hereſy: in confirmation of which, the following paſſages from the *Corpus Juris Civilis* may be conſulted. In the Digeſts (D. 32. *l.* 23.) we have this Reſponſe of the Lawyer Paulus. *Ex* imperfecto *Teſtamento Legata vel Fidei-commiſſa* Imperatorem *vindicare*, inverecundum *eſt*: decet *enim tantæ majeſtati eas* ſervare *leges, quibus ipſe* ſolutus *eſſe videtur*. Which is more fully explained in a Conſtitution of the Emperor Alexander. (C. 6. 23. 3.) *Ex* imperfecto *Teſtamento nec* Imperatorem *Hæreditatem vindicare* poſſe, *ſæpe conſtitutum eſt: Licet enim Lex Imperii* ſolennibus juris *Imperatorem* ſolverit; *nihil tamen tam proprium Imperii eſt, quam* legibus vivere. To the ſame purpoſe is a Law of the Emperors Theodoſius and Valentinian. (C. 1. 14. 4.) *Digna vox eſt majeſtate Regnantis*, legibus alligatum *ſe Principem profiteri: adeo de auctoritate Juris Noſtra pendet Auctoritas; et revera majus Imperio eſt, ſubmittere* legibus *principatum*. And Juſtinian himſelf, though in one of his Novels (Nov. cv.) he aſſerts, that *Deus ipſas* leges Imperatori *ſubjecit*, legem animatam *eum mittens hominibus*; yet in another place (I. 2. 17. 8.) affirms, as Severus and Antoninus had done before him, *Licet legibus* ſoluti ſimus, *attamen legibus* vivimus. Hence it ſhould ſeem, that when it is ſaid of an abſolute prince that he is *ſolutus legibus*, the expreſſion muſt be interpreted of ſuch laws only as are *purely civil*; as, for inſtance, that ſeven witneſſes ſhould be neceſſary to make a *perfect* Teſtament: and yet even to theſe, we find, it was always thought the prudent and decent part for him to conform, in order to ſet an example of obedience to his ſubjects. So that, after all that has been written on the famous text of Ulpian, † on which Martin chiefly ſupported his poſition, the words in effect amount to *little more* than a common maxim of the law of England, that the King, in his political capacity, can do no wrong. See the Treatiſe of Arthur Duck, *de Uſu et Authoritate Juris Civilis Romanorum*, Lib. I. cap. 3. ſect. xi. xii. with the authors he has quoted in the margin.

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In commune jubes ſi quid, cenſeſve tenendum,
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Fit populus; nec ferre negat, cum viderit ipſum
Auctorem parere ſibi. Componitur Orbis
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De 4to Conſulatu Honorii. ℣ 295 *et ſeq.*

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Imperial Rome. And here it becomes me to acknowledge the great aſſiſtance I have received from the Commentaries on the Laws of England by the elegant author mentioned above; without which, I freely confeſs, I ſhould not have executed this part of my work with half the advantage I have now been enabled to give it, when aided by his learned volumes. On this occaſion too I will not neglect to own, that ſome help has been afforded me from the Notes inſerted by Dr. HARRIS in his uſeful Edition of Juſtinian's Inſtitutions, which he has publiſhed in their original language, together with an Engliſh tranſlation.

In a few caſes I have remarked what ſeemed worthy of notice in the Roman Canon Law: ſome parts of which are very neceſſary to be adverted to by an Engliſh lawyer; eſpecially the manner of computing the degrees of Conſanguinity by that law, without a knowledge of which no one can underſtand the doctrine of Deſcents, or the mode of Inteſtate Succeſſion to an Eſtate in Lands, as ſettled by the regulations of our own country. And indeed it may be obſerved with truth of that whole ſyſtem, that however cenſurable it may be, when conſidered as calculated to ſupport an unbounded ſupremacy in the Pope and Clergy, yet in another view, as a collection of rules and principles reſpecting the adminiſtra-

tion

tion of juſtice, and the rights and properties of individuals, it merits no ſmall ſhare of praiſe; and, in conjunction with the Civil law, certainly contributed to introduce more juſt and liberal ideas than had yet obtained of the nature of government, and the peace and order of ſociety.*

The author of the Commentaries ſpeaking, in his Introduction, of the Study of the Law, after having obſerved that a general acquaintance with the Roman Juriſprudence has ever been deſervedly regarded, even in England, as no ſmall accompliſhment of a gentleman, goes on to remark as follows: "Far be it "from me to derogate from the ſtudy of the "Civil Law, conſidered (apart from any bind-"ing authority) as a collection of Written "Reaſon: No man is more thoroughly per-"ſuaded of the general excellence of its rules, "and the uſual equity of its deciſions; nor "is better convinced of its Uſe as well as "Ornament to the SCHOLAR, the DIVINE, "the STATESMAN, and even the COMMON "LAWYER."† Theſe words are ſo pertinent in themſelves, and correſpond ſo exactly to my own ideas of the worth and importance of the ſyſtem I am here to explain, that in what

* See the Hiſtory of Charles V. by Dr. Robertſon, Vol. I. ſect. I. art. vi.

† Introduction, § 1.

what remains of this Preface, I ſhall content myſelf with enlarging on this *text*, and endeavouring to elucidate the truth and importance of the ſeveral particulars contained in it. In doing this, I wiſh not to exalt the Civil law above its juſt meaſure: every liberal art has a natural connection, more or leſs remote, with every other; and every true friend of learning, far from making or inſinuating invidious and often ill-founded compariſons, will labour to promote a friendly coalition between them all. The ſimple purpoſe I aim at is no more than this, to raiſe the profeſſion, of which it is my lot to be the appointed guardian, to that proper degree of credit, below which I am of opinion it has been unduly depreſſed; and to prove that it has at leaſt as near an alliance with all the branches of polite literature, as any other that may be found in the whole family of ſciences.

1. And firſt, with regard to the utility of the Roman Law to the SCHOLAR, it needs but few words to ſhew, that a ſcience ſo converſant as this in the great principles of juſtice and equity, which diſtinguiſhes with ſuch care the boundaries of right and wrong, which teaches us the ſeveral relations we ſtand in to our fellow creatures, and the rules by which our own conduct muſt be regulated, which is founded in human nature and applies to all the

the affairs of human life, between nation and nation, man and man; muſt ſurely be entitled to one of the higheſt places in our eſteem. It will be to entertain a very mean and diſparaging opinion of the venerable monuments of ancient wiſdom contained in the body of the Roman law, to regard the rules there laid down for the deciſion of controverted points, whether of a public or private nature, as the maxims of mere lawyers: thoſe great maſters of legiſlation were as eminent for their ſkill in moral as in legal knowledge, and the ſublimeſt notions both in philoſophy and religion are inculcated in their writings. Accordingly we find them frequently called, among their other titles, *Juris Divini et Humani periti*; and the very definition of Juriſprudence, given by Ulpian, * like that of *Sapientia* by Cicero, † is *Divinarum atque Humanarum rerum notitia*. This affinity between the ſtudy of law and philoſophy has impreſſed a remarkably ſcientifical caſt on the Reſponſes of the Roman Sages; and a competent knowledge of their tenets and principles is abſolutely neceſſary in order to underſtand, with exactneſs and taſte, the alluſions to Roman cuſtoms and manners, which abound in the claſſical Latin authors, whether Poets or Hiſtorians. To which muſt be added, what will ſtill more recommend this ſcience to the polite ſcholar, the purity of the lan-

* D. 1. 1. 10, 2. I. 1. 1. 1. † Cic. de Offic. I. 43. and II. 2.

language, in which the Pandects in particular are compoſed; which are held to be ſo perfect and elegant in point of ſtyle, that the Latin tongue might be retrieved from them, were all other Latin authors loſt.

If the ſtudy of the Civil Law be thus uſeful to the Scholar in general, it muſt be ſtill more eminently ſerviceable to the ACADEMIC in particular. It is admirably calculated to furniſh the minds of youth with univerſal and leading notions, relating to Natural and Poſitive, to Written and Unwritten Law: it inſtructs them in the various rights of Perſons, whether in a natural or civil capacity; the origin and rights of Property; the grounds and reaſons of Teſtamentary and Legal Succeſſion; the Obligations ariſing from Proper and Improper Contracts; the ſeveral ſpecies of Civil Injuries and Crimes; together with the means of applying for and obtaining Redreſs, and of bringing the guilty to condign Puniſhment. Theſe are matters of the utmoſt importance in themſelves, peculiarly uſeful when conſidered as ſubjects of Academical diſcipline, and no where more ſucceſsfully illuſtrated than in the Cæſarean law. Then, as ſaid before, that it is written in a learned language, and bears an intimate relation with the Roman Hiſtory and Antiquities, are circumſtances which recommend this ſcience in a particular manner to young ſtudents; as they ſerve to place it in a middle

middle way between the claſſical erudition they have gained at ſchool, and the laws of their own country, to the ſtudy of which it is the beſt preparation. It was probably for ſome ſuch reaſons as theſe, that the Civil Law was made one of the three profeſſions we are ſuppoſed to follow, in both our Engliſh Univerſities;* and both in this place and at Oxford, the profits of ſeveral Fellowſhips are appropriated to the encouragement of it. A valuable privilege is likewiſe indulged to Graduates in this faculty, by the ſtatute law of the kingdom; Doctors and Bachelors of Laws, who have performed the cuſtomary exerciſes in order to ſuch degrees, being permitted (by 22 Henry VIII. c. 13.) to hold two Benefices with cure; which no Maſter of Arts can do without a Chaplainſhip to ſome of the Royal Family, or to ſome Lord, or other perſon there mentioned, who is entitled to have Chaplains. In the Univerſities alſo on the Continent, where the connexion between the Imperial and Municipal laws is much more viſible than in England, this art is taught, and conſidered as an almoſt neceſſary accompliſhment of every gentleman: and in our aſſociate kingdom of Scotland, where the Roman law is of much more authority than with us, it is difficult, as Mr. Juſtice Blackſtone obſerves,* to meet with a perſon

* See Appendix, No. I.

† Introduction to the Commentaries on the Laws of England, § 1.

perſon of liberal education, who is deſtitute of a complete knowledge in that ſcience, which is to be the guardian of his natural rights, and the rule of his civil conduct. The ſame author laments, in pathetic terms, the faſhion, that has prevailed of late, for men of birth and diſtinction to ſend the growing hopes of their families to foreign Academies, in order to attend lectures, conveyed in a dead or unknown language, on the Civil law; where they are left at large, in a dangerous ſeaſon of life, their morals and their ſtudies both truſted to their own direction; and where, it is to be feared, they often imbibe opinions in religion and government, neither ſort compatible with the generous ſpirit of civil and religious liberty, as profeſſed in Britain. The only laudable way of removing ſo diſgraceful a neceſſity, is to introduce a regular courſe of Lectures on the Imperial law at home; and at the ſame time ſo to contrive thoſe Lectures, as to prevent the danger, which might otherwiſe be apprehended, of inſtilling falſe or arbitrary principles into the mind, by laying hold of every proper opportunity of pointing out the defects of the Roman ſyſtem, and the ſuperior excellence of our own. But a deſign of this ſort can no where be ſo ſucceſsfully undertaken, as at the Univerſities; where Degrees in the faculty are actually conferred, and where a number of young gentlemen are collected from all parts of the kingdom,

kingdom, with the profeſſed intention of being inſtructed how beſt to attain, what is ſurely the moſt important of human acquiſitions, the knowledge of uſeful learning and of pure religion. How far in the following Analyſis I have accompliſhed ſuch a deſign, is not for me to ſay: but this I am bold to aſſert, that I have laboured faithfully to diſcharge the office committed to my care; and in whatever degree I may be thought to have fulfilled ſo weighty a truſt, I have the conſcious ſatisfaction of endeavouring at leaſt, according to my meaſure, and to the beſt of my abilities, to contribute to the general good.

Beſides the reaſons now alleged, which evince the propriety of the ſtudy of the Civil Law, conſidered as a branch of Academical education, there is another, which brings the matter ſtill nearer to ourſelves, namely, that it is the very law by which the two Univerſities of England are governed, and by which all civil controverſies, excepting pleas of frank tenement, are directed to be decided. In the Univerſity of Cambridge in particular, the ſtatutes of queen Elizabeth, given in the year 1570, and the Decrees of the Senate, which are the eſtabliſhed rules by which our Academical behaviour is regulated, are unintelligible in thoſe places where they treat of Judicial Proceedings, and of the method of

proſecuting Appeals, without a previous acquaintance with the *Form of Private Judgments*, as ſettled in the Imperial law.* And were ſome of thoſe, who allow themſelves to declaim on the inutility and unprofitableneſs of this ſcience, to be aſked to explain the meaning of certain parts of the ſtatutes of their own Colleges, it is probable they would be not a little diſtreſſed how to return an anſwer, which might ſerve to conceal their ignorance, or juſtify their pretences to ſuperior knowledge.† My reader will excuſe me, if here I make a diſtinction: it is one thing to have a clear and luminous view of a ſubject throughout, which is the property of the true ſcholar only; and it is another thing to be barely capable of rendering into Engliſh a Latin word; which is the utmoſt perfection of knowledge in modern ſcioliſts,

* See Appendix, No. III, IV, V. which compare with Chap. IX, X, XI. of the third book of the Analyſis; where the technical terms, in thoſe numbers of the Appendix, are explained.

† A ſtory is told of Servius Sulpitius, when he conſulted the famous Mutius Scævola on a point of law, which may be worth reciting. *Servius, cum in cauſis orandis primum locum, aut pro certo poſt M. Tullium obtineret, traditur ad conſulendum Quintum Mucium de re amici ſui perveniſſe: cumque eum ſibi reſpondiſſe de jure Servius parum intellexiſſet, iterum Quintum interrogaſſe; et a Quinto Mucio reſponſum eſſe, nec tamen percepiſſe; et ita objurgatum eſſe a Quinto Mucio; namque eum dixiſſe,* Turpe eſſe Patricio, et Nobili, et cauſas oranti, Jus, in quo verſaretur, ignorare. *Ea velut contumelia Servius tractatus, operam dedit Juri Civili: et — hujus volumina complura extant; reliquit autem prope centum et octoginta libros.* D. 1. 2. 2, 43.

ſcioliſts, and that too derived from no purer ſource, than the muddy current of a dictionary.

2. It may perhaps ſeem ſtrange to aſſert the utility of the Roman law to the DIVINE. But when it is recollected that frequent alluſions to this law, in the inſtances of Adoption, the right of Citizenſhip, Slavery, &c. occur in the New Teſtament, and eſpecially in the writings of St. Paul; * when it is remembered too that many of this profeſſion are often called to preſide as Judges in the Spiritual Courts; and when it is further conſidered, how great a proportion the Civil law bears in compoſing the Eccleſiaſtical law of England; it will appear, that a competent ſkill in Roman Juriſprudence is far from being foreign to the character of a Divine; as it qualifies him to underſtand with accuracy the original records of his faith, to ſupport the dignity of his character as a Spiritual Judge, and to defend and ſecure the poſſeſſion of his legal dues.

3. Nor

* See the Annotations of Grotius on the New Teſtament, particularly on the Acts of the Apoſtles, and the Epiſtles of St. Paul; which are full of quotations from the Civil law. This obſervation may be extended to another learned work of the ſame author, *De Jure Belli et Pacis*; which has a perpetual reference throughout to the Roman Cuſtoms and Laws, and cannot well be underſtood by one, who is deſtitute of all knowledge in this part of learning.

3. Nor will this ſtudy be leſs ſerviceable to the STATESMAN than to the Divine. It is impoſſible that foreign nations ſhould carry on their tranſactions with each other without having recourſe to ſome common ſtandard, by which to regulate their diſputes; and this common ſtandard, by the conſent of all, is the Roman Civil Law: in which the rights and privileges of Ambaſſadors, the interpretation of Leagues and Treaties, the incidents of War and Peace, are diſcuſſed with a care and preciſion, in vain to be ſought for in the Inſtitutions of other kingdoms. Thoſe gentlemen therefore, who, on account of their birth or fortune, have the honour to be ſelected to perſonate their ſovereign in foreign courts, would ſurely do well to aquaint themſelves betimes with this great medium of national intercourſe; that they may not be liable to be impoſed on in their negotiations with ſtateſmen of other kingdoms, but be qualified at the ſame time to do honour to themſelves, and ſervice to their country.

4. It remains, in the laſt place, that we ſhew the benefit, which the Civil Law is able to afford even to the COMMON LAWYER. And here, though it be granted, that leſs of the Roman Juriſprudence hath been introduced among us, than in any other country of Europe, and thoſe, who apply to the ſtudy of the Common Law, often boaſt, and ſometimes gratuitouſly

tuitouſly enough, of this diſtinction; yet that certain parts and principles of the Imperial law have been incorporated into our own, is a fact too inconteſtible to be denied. The learned Selden, in his Diſſertation on Fleta * (a commentary on the Engliſh law ſo called, becauſe written by an unknown author, who was a priſoner in the *Fleet*, in the reigns of Edward II. and III.) has ſhewn, that during the greateſt part of the ſubjection of this iſland to the Romans, or from the time of Claudius to that of Honorius, about 360 years, it was chiefly governed by the Cæſarean law; within which interval, Papinian, Ulpian, Paulus, and others of the Roman lawyers, whoſe Reſponſes make ſo diſtinguiſhing a figure in the Pandects, preſided in the ſeat of judgement in this kingdom. From the age of Honorius, the Saxon, Daniſh, and Norman cuſtoms took place, and continued for 740 years, without any intermixture, as is ſuppoſed, of the Imperial law. But the fortunate diſcovery of the Pandects of Juſtinian, which was made in the middle of the 12th century by the Piſan ſoldiers at Amalfi, gave a new ſpirit to the ſtudy of this art, then ſunk by means of the irruptions of the barbarous nations into an almoſt total oblivion, in Italy firſt, and afterwards in every other part of Europe. Lectures in the ſcience were publicly

* Cap. 4.

licly read in England, by the famous Vacarius, under the patronage of Archbiſhop Theobald, both in the archiepiſcopal palace at Lambeth, and at the Univerſity of Oxford; not long after Irnerius had opened a college for the ſame purpoſe at Bologna. And although the ardour of this new purſuit might in ſome meaſure be repreſſed by Stephen the then king, who, to gratify his own reſentments againſt the Pope, had by an Edict prohibited the teaching of the Roman Law; it was ſtill ſtudied with avidity in the ſchools and monaſteries of the eccleſiaſtics, whoſe chief and favourite employment it was; and from the reign of Stephen to that of Edward III. that is, for the ſpace of near 200 years, was held in great and general eſtimation.*

And now, who will wonder that, with theſe advantages, the Civil law ſhould inſinuate itſelf by inſenſible degrees into the ſyſtem of Engliſh Juriſprudence, and that the moſt venerable of our Lawyers ſhould not ſcruple to adopt the rules and reaſonings of it, not only occaſionally in the courſe of their pleadings, but more deliberately in their graveſt and moſt ſerious compoſitions? The oldeſt publication on the Common law now extant is that of

* See the firſt of the two Dialogues of Dr. HURD, *On the Conſtitution of the Engliſh Government*; where the fate and fortunes of the Civil Law in England are delineated at large, with the uſual elegance of this moſt learned Author.

of Glanvil, Lord Chief Juſtice in the reign of Henry II. and the beginning of the Preface to that work is a direct imitation of the Proemium to the Inſtitutions of Juſtinian. Both the words and the doctrine of the ſame book are quoted by Bracton, a Judge in the time of Henry III. in his treatiſe *de legibus ac conſuetudinibus Angliæ*, and he perpetually uſes the Roman names of Titius and Sempronius, inſtead of the A and B of an Engliſh lawyer. Other authors, of name and credit, have not ſcrupled, as occaſion ſerved, to uſe the maxims and rules of the Civil law: And, as Wood obſerves,* Fleta and Britton, and the moſt ancient of our writers, would look very naked, if every Roman lawyer ſhould pluck away his feathers.

But we are not without other more direct proofs of the actual reception of the Roman laws in Britain. The ingenious Author of *Obſervations on the more ancient Statutes* † hath ſhewn, from ſeveral inſtances, that many ideas of our law have been plainly borrowed from the Roman. One of theſe inſtances is the power of the Attorney General to file Informations *ex officio*; which ſeems to be taken from the Civil law, where there is always a public proſecutor. The denying of a Felon to make his defence by an advocate, and not permitting

* Preface to his Inſtitute of the Imperial Law.

† Page 76. Edition 2d.

mitting his witneſſes to be examined upon oath till the late ſtatute, are other examples of the like nature. To theſe we may add the Form of Trial in the Court of Chancery, evidently derived from the ſame ſource: here the complaint is by Petition or Bill, which anſwers to a Libel; the Defendant makes an Anſwer in writing, which contains alſo his Defence; to this ſucceed Replications, Exceptions, Interrogatories, Witneſſes privately examined, a Sentence of the Judge in writing without the intervention of a Jury; and, if neceſſary, an Appeal alſo in writing to the Upper Houſe of Parliament: And almoſt all the Chancellors or Judges of this Court, from Becket to Wolſey, that is, from the age next after the Conqueſt to the Reformation, were Eccleſiaſtics and Civilians. In Teſtamentary Cauſes, where our own laws are ſilent, or not ſufficiently expreſs, the Courts in England, which have cognizance of the diſtribution of the effects of perſons dying Inteſtate, are chiefly guided by the doctrine of one of Juſtinian's Novels. And, to mention no more, the Imperial law, to this day, obtains, under different reſtrictions, in the Courts of Biſhops and their officers, the Courts Military, the Courts of Admiralty, and the Courts of the two Univerſities: in all which it has been received either by the conſent of Parliament, and ſo is become a part of the Statute or Written law; or by immemorial

uſage

uſage and cuſtom, and thus conſtitutes an inferior branch of the Common or Unwritten law. Every one therefore, who would excel in his profeſſion, either as a Civilian or a Common Lawyer, ought to acquaint himſelf with the nature and juriſdiction of theſe ſeveral courts; in order to know exactly when they confine themſelves within their proper limits; and when, in caſe of encroachment, they are liable to be reſtrained by Prohibition.

Still it is not to be diſſembled, that frequent inſtances occur in our Hiſtory of great oppoſition made to the Civil Laws of Rome, whenever either the Crown or the Church have attempted, for reaſons of their own, to introduce them into England. Nor is this circumſtance, fairly eſtimated, any juſt objection to the real excellence of the laws themſelves: for though on the one hand it were a mark of ſtrange obſtinacy or ignorance to deny, that the laws of England have received great improvements, by ingraftments from the Roman; yet on the other hand it ought alſo to be confeſſed, it was a wiſe caution of the Barons to prevent theſe foreign laws from acquiring too great an authority; particularly in matters of that high nature, relating to government and the liberty of the ſubject. Again it muſt be owned, that many of the Roman uſages, ſuch as Slavery, Adoption, the Power of a Father, Subſtitutions, Poſſeſſion of Goods, Stipulations,

and

and the like, are entirely unknown with us, and ſome of them abhorrent from the free and liberal ſpirit of our conſtitution. But, with all theſe deductions, it may ſtill be maintained with truth, that the Civil law is well deſerving of the praiſes, which the learned of all countries have beſtowed upon it, on account of its own inherent perfections. Nor have I the ſmalleſt ſcruple to aſſert, that the ſtudent, who confines himſelf to the inſtitutions of his own country, without joining to them any acquaintance with thoſe of Imperial Rome, will never arrive at any conſiderable ſkill in the grounds and theory of his profeſſion: though he may perhaps attain to a certain mechanical readineſs in the forms and practical parts of the law, he will not be able to comprehend that enlarged and general idea of it, by which it is connected with the great ſyſtem of Univerſal Juriſprudence; by the knowledge of which alone he will be qualified to become a Maſter in this art, and capable of applying it, as an honourable means of ſubſiſtence for himſelf, and of credit to his country.*

Before I conclude, I beg leave to intreat the candour of thoſe of my readers, whoſe ſuperior abilities

* So at leaſt the excellent Author of the Commentaries, ſo often quoted in this Preface, ſeems to have thought; when he recommends it to the ſtudent, in order to qualify himſelf to enter on the ſtudy of the Engliſh laws with advantage and reputation, firſt of all to impreſs on his mind the ſound maxims of the law of Nature, the beſt and moſt authentic foundation of human laws, and then to contemplate thoſe maxims reduced to a practical ſyſtem in the laws of Imperial Rome. Introduction, § 1.

abilities may enable them to diſcover any material errors in the following Analyſis; and to aſſure them, that whatever miſtakes are pointed out to me, they ſhall be rectified with thanks, in a future Edition. Nor ought I to omit the opportunity, now afforded me, of expreſſing my grateful acknowledgements for the many inſtances of encouragement received from thoſe, whoſe approbation I am moſt ambitious to procure; and for the attendance, with which my Lectures have been honoured by perſons of the higheſt rank and fortunes in the Univerſity. I have no intentions, at preſent, to obtrude myſelf on the public by any further attempts to illuſtrate the Civil law: The plan, which I had formed on my firſt entrance on this ſubject, is at length completed: it now remains, that I return to thoſe more ſerious and important ſtudies, to which I had originally devoted myſelf and miniſtry, and from which (for I know not what ſhould hinder me from confeſſing it) I ſhould never have diverted, but from *profeſſion* rather than *inclination*.

In the *ſecond* Edition of this Analyſis I prefixed to each Chapter a liſt of the Books, by conſulting which the ſeveral propoſitions may be explained. In this *third* Edition many corrections with ſome additions are interſperſed, which I hope may contribute to the greater perfection of the whole.

AN

19 January, 1779.

AN

ANALYSIS

OF THE

ROMAN CIVIL LAW.

AN

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11. Sentence.
12. Execution.

And, ſometimes, in Judgments of the People, by

1. *Diei Dictio.*
2. *Citatio Rei.*
3. *Accuſatio.*
4. *Promulgatio.*
5. *Defenſio Rei.*
6. *Populi vel Plebis Suffragia.* XIII.

AN

ANALYSIS

OF THE

ROMAN CIVIL LAW.

BOOK THE FIRST.

Of the RIGHTS *of* PERSONS.

CHAP. I.

Of the ROMAN CIVIL *and* CANON LAWS, *and their Authority in* ENGLAND.

Dig. Lib. I. Tit. 2. pr. § 1—14.
Duck *de Uſu et Authoritate Juris Civilis Romanorum.*
Hoppii *Comment. ad Inſtitutiones Juſtinianeas.* Præcognita Juris.
Heineccii *Antiquitates Romanæ.* Proemium.
———*Elementa Juris Civilis.* Proemium.
Taylor's *Elements of the Civil Law.* Introduction.
Burn's *Eccleſiaſtical Law.* Preface.
Dr. Hurd's firſt Dialogue *On the Conſtitution of the Engliſh Government.*

1. THE Syſtems of ROMAN CIVIL LAW, before the age of the Emperor Juſtinian, were chiefly theſe. 1. LEGES REGIÆ; collected by PAPIRIUS. 2. LEGES DECEMVIRALES, or the Laws of the XII Tables. 3. *Jus Civile* FLAVIANUM; to which the *Jus Civile* ÆLIANUM was a Supplement. 4. EDICTUM PERPETUUM JULIANI. 5. The CODES of GREGORY, HERMOGENES and THEODOSIUS.

2. The IMPERIAL or CIVIL LAW, as reformed by JUSTINIAN, conſiſts of four Parts. 1. The INSTITUTIONS. 2. The DIGESTS or PANDECTS. 3. The CODE. 4. The NOVELS.*

3. The ECCLESIASTICAL or CANON LAW is chiefly comprized 1. in the DECREE. 2. in the DECRETALS. The Decree has Three Parts; namely (1) Diſtinctions. (2) Cauſes. (3) a Treatiſe concerning Conſecration. The Decretals alſo are in Three Parts; namely (1) Gregory's Decretals in Five Books. (2) the ſixth Decretal. (3) the Clementine Conſtitutions. The EXTRAVAGANTS of John XXII. and other later Popes were added as NOVEL Conſtitutions to the reſt.†

4. The

* It may not be amiſs, for the ſake of Beginners, to explain here the method of *quoting* the ſeveral parts, which now compoſe the CORPUS JURIS ROMANO-CIVILIS. The INSTITUTIONS are contained in Four Books: each Book is divided into Titles; and each Title into Paragraphs; of which the firſt, deſcribed by the Letters *pr.* or *princip.* is not numbered. The DIGESTS or PANDECTS are in Fifty Books: each Book is diſtributed into Titles; each Title into Laws; and, very frequently, Laws into Paragraphs, of which the firſt is not numbered. The CODE is comprized in Twelve Books; each of which is divided, like the Digeſts, into Titles and Laws; and, ſometimes, Laws into Paragraphs. The NOVELS are diſtinguiſh d by their Number, Chapter and Paragraph.

The old way of quoting was much more troubleſome, by only mentioning the Number, or initial Words, of the Paragraph or Law, without expreſſing the number either of Book or Title. Thus § *ſi adverſus* 12. *Inſt. de Nuptiis* means the 12th Paragraph of the Title in the Inſtitutions *de Nuptiis*, which Paragraph begins with the words *ſi adverſus*; and which a modern Civilian would cite thus, I. 1. 10. 12. So *l.* 30. *D. de R. J.* ſignifies the 30th Law of the Title in the Digeſts *de Regulis Juris:* according to the modern way, thus, D. 50. 17. 30. Again, *l.* 5. § 3. *ff. de Jurejur.* means the 3d Paragraph of the 5th Law of the Title in the Digeſts *de Jurejurando:* better thus, D. 12. 2. 5, 3. And here note, that the Digeſts are ſometimes referred to, as in the laſt inſtance, by a double *f*; and at other times by the Greek Π or π.

† The method of quoting the ROMAN CANON LAW is as follows. The DECREE, as ſaid above, conſiſts of Three Parts; of which the firſt contains 101 Diſtinctions, each Diſtinction being

4. The Canon Law of ENGLAND comprehends, beſides the collections of the Roman Pontiffs, LEGATINE

being ſub-divided into Canons: thus 1 *diſt. c.* 3. *Lex* (or 1 *d. Lex*) is the firſt Diſtinction, and 3d Canon, beginning with the word *Lex*. The ſecond part of the Decree contains 36 Cauſes; each Cauſe comprehending ſeveral Queſtions, and each Queſtion ſeveral Canons: thus 3. *qu.* 9. *c.* 2. *Caveant* is Cauſe the 3d, Queſtion the 9th, and Canon the 2d, beginning with *Caveant*. The third part of the Decree contains 5 Diſtinctions, and is quoted as the firſt part, with the addition of the words *de Conſecratione*, thus *de Conſecr. diſt.* 2. *can. Quia corpus* (or *can. Quia corpus* 35. *diſt.* 2. *d. Conſecr.*) means the 2d Diſtinction, and the 35th Canon, of the Treatiſe *de Conſecratione*, which Canon begins with *Quia corpus*.

The DECRETALS are in Three Parts; of which the firſt contains Gregory's Decretals in 5 Books; each Book being divided into Titles, and each Title into Chapters: And theſe are cited by the name of the Title, and the number of the Chapter, with the addition of the word *Extra*, or the capital letter X: thus *c.* 3. *Extra de Uſuris*; is the 3d Chapter of the Title in Gregory's Decretals, which is inſcribed *de Uſuris*; which Title, by looking into the Index, is found to be the 19th of the 5th Book. Thus alſo *c. cum contingat* 36. *X. de Offic. & Pot. Jud. Del.* is the 36th Chapter, beginning with *Cum contingat*, of the Title, in Gregory's Decretals, which is inſcribed *de Officio et Poteſtate Judicis Delegati*; and which, by conſulting the Index, we find is the 29th Title of the 1ſt Book. The Sixth Decretal, and the Clementine Conſtitutions, each conſiſting of 5 Books, are quoted in the ſame manner as Gregory's Decretals; only, inſtead of *Extra* or X, there is ſubjoin'd *in ſexto* or *in* 6. and *in Clementinis* or in *Clem.* according as either part is referred to: thus *c. Si gratioſe* 5. *de Reſcript. in* 6. is the 5th Chapter, beginning with *Si gratioſe*, of the Title *de Reſcriptis*, in the 6th Decretal; the Title ſo inſcribed being the 3d of the 1ſt Book: And *Clem.* 1. *de Sent. et Re Judic.* (or *de Sent. et R. J. ut calumniis. in Clem.*) (or *c. ut calumniis.* 1. *de Sent. et R. J. in Clem.*) is the 1ſt Chapter of the Clementine Conſtitutions, under the Title *de Sententiâ et Re Judicatâ*; which Chapter begins with *Ut calumniis*, and belongs to the xith Title of the 2d Book.

The EXTRAVAGANTS of John the 22d are contained in one Book, divided into 14 Titles: thus *Extravag. Ad Conditorem. Joh.* 22. *de V. S.* means the Chapter, beginning with *Ad Conditorem*, of the Extravagants of John 22d; Title, *de Verborum Significationibus.* Laſtly, the Extravagants of later Popes are called *Communes*; being diſtributed into 5 Books, and theſe again into Titles and Chapters: thus *Extravag. Commun. c. Salvator. de Præbend.* is the Chapter, beginning with *Salvator*, among the *Extravagantes Communes*; Title, *de Præbendis.*

GATINE and PROVINCIAL Conſtitutions; and ſo far as it was received here before the ſtatute of 25 Henry VIII. c. 19. and is not repugnant to the Common Law, the Statute Law, and the Law concerning the King's Prerogative, is acknowledged to be in force by the authority of Parliament.

5. The Canons made in England in 1603, and never confirmed in Parliament, ſo far as they are agreeable to the ancient Canon Law, bind the Laity; ſo far as they contain new regulations, are binding on the Clergy only.

6. The fate and fortunes of the Civil Law in EUROPE, and particularly in ENGLAND.

CHAP. II.

Of LAW *in general*; *and of the diviſions and parts of the* CIVIL *and* ENGLISH *Laws.*

Inſt. Lib. I. Tit. 1. 2.
Dig. Lib. I. Tit. 2. § 15--end.
——— Tit. 3. 4.
Hoppii *Comm.* Lib. I. Tit. 1. 2.
Heinecc. *Antiq. Rom.* Lib. I. Tit. 1. 2.
———*El. J. C.* Lib. 1. Tit. 2.
Wood's *Inſtitute of the Civil Law.* Introduction.
Taylor's *El. of Civ. Law:* art. *Law and Right*; *Public and Private Law*; *Pontifical Law*; *Juſtice, Equity*; *Law of Nature, Law of Nations, Civil Law: Lex, Plebiſcitum, Senatus-Conſultum, Prætor's Edicts, Reſponſa Prudentum, Imperial Conſtitutions*; *Cuſtom.*
Grotius *de Jure Belli et Pacis.* Lib. I. C. I.
Rutherforth's *Inſtitutes of Natural Law.* Vol. I. Ch. 2.
Blackſtone's *Commentaries on the Laws of England.* Introduction. Sect. 1. 2.

1. JUSTICE is a diſpoſition of mind to render to every one his Right. RIGHTS are perfect or imperfect: From the idea of Right is produced that of OBLIGATION.

2. Law is a rule of action, preſcribed by authority.

3. All

3. All Law is NATURAL or INSTITUTED. In what manner the Law of NATURE, the Law of NATIONS, and CIVIL Law, are diſtinguiſhed from each other by the Roman Lawyers.

4. The Roman People, when aſſembled to make Laws, were divided three ways, into what were called CURIÆ, CENTURIÆ, TRIBUS: Theſe aſſemblies were denominated COMITIA CURIATA, CENTURIATA, TRIBUTA.

5. The Roman Civil Laws are of two kinds, 1. WRITTEN. 2. UNWRITTEN. The Written Law is either PUBLIC or PRIVATE.

6. Of the WRITTEN Law there are ſix parts. 1. LEX. 2. PLEBISCITUM. 3. SENATUS-CONSULTUM. 4. EDICTA MAGISTRATUUM. 5. RESPONSA PRUDENTUM. 6. PLACITA PRINCIPUM.

7. LEX is, what was enacted by the whole body of the Roman People, aſſembled at the *Comitia Curiata* or *Centuriata*; at the recommendation of one of the greater Magiſtrates.

8. PLEBISCITUM is, what was enacted by the Plebeians, aſſembled at the *Comitia Tributa*; at the recommendation of a Plebeian Officer, the Tribune.

9. In paſſing a Law or Plebiſcite among the Romans, the Method was, after previouſly putting it in Writing at home, 1. Communication of it to the Senate. 2. Promulgation. 3. Recitation at the *Comitia*. To this ſucceeded, in caſe of no Interceſſion by one or more of the Tribunes, 4. *Sortitio*, or determination by Lot of the Order of Voting, among the Centuries or Tribes. 5. *Rogatio*. 6. Voting for or againſt the Law, *per Tabellas*. 7. *Suffragiorum diremptio*. 8. Confirmation.

10. SENATUS-CONSULTUM is a Decree of the Senate, concerning ſuch Things as were committed to their Juriſdiction; which had not properly the force of Law, unleſs confirmed by the People.

11. The

11. The Method of making a Decree of the Senate, during the times of the Roman Republic, was 1. Propoſing it by one of the Conſuls, or the Prætor; which was called *Relatio ad Senatum.* 2. *Rogatio.* 3. Voting for or againſt the Decree, *per Diſceſſionem.* 4. Putting the Decree in writing. 5. Confirmation. After the deſtruction of the Republic, the Decrees of the Senate were little more than the Will of the Emperor, declared *mediante Senatu.*

12. EDICTA MAGISTRATUUM are Edicts of the Prætors and Ediles; which together made up the Syſtem, called *Jus Honorarium.*

13. RESPONSA PRUDENTUM are Opinions of thoſe, to whom it was permitted to anſwer authoritatively on matters of Law. Theſe, collected together, were called, emphatically, *Jus Civile.*

14. PLACITA PRINCIPUM are Conſtitutions of the Roman Emperors. Theſe were 1. General. 2. Special. The General were (1) *Epiſtolæ.* (2) *Decreta.* (3) *Edicta.* The Special were called *Privilegia.*

15. The UNWRITTEN Law is CUSTOM.

16. The Laws of ENGLAND are alſo of two kinds. 1. The WRITTEN or STATUTE Law. 2. The UNWRITTEN or COMMON Law.

17. The ECCLESIASTICAL Law of ENGLAND is compoſed of the CIVIL, CANON, COMMON and STATUTE Laws.

18. EQUITY is the correction of the Written Law, when, on account of its generality, it is too rigid or defective.

19. The OBJECTS of the Civil Law are I. the Rights of PERSONS. II. the Rights of THINGS. III. ACTIONS, or the Means of recovering by Law what is due.

CHAP.

CHAP. III.

Of PERSONS *in general; and of* FREEMEN *and* SLAVES.

Inſt. Lib. I. Tit. 3—8.
Hoppii *Comm.* Lib. I. Tit. 3—8.
Heinecc. *A. R.* } Tit. 3—8.
——— *El. J. C.* }
Wood's *Inſt. of Civ. Law.* Book I. ch. 1. 2.
Eſprit des Loix. Liv. XV.
Lettres Perſanes. Lett. 115.
Taylor's *El. of Civ. Law.* art. *Perſons* and *Servitude.*
Grotius *de J. B. & P.* Lib. II. C. V. § 27, 29, 30. C. XXII. § 11. Lib. III. C. VII.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 20.
Wood's *Inſtitute of the Laws of England.* B. I. Ch. 1.
Blackſtone's *Comm.* B. I. Ch. 14. B. II. Ch. 6.
Sullivan's *Lectures on the Feudal and Engliſh Laws.* Lect. 24. 25.
Obſervations on the more ancient Statutes. Ed. 3. 1769.
Ld. Lyttelton's *Hiſtory of Henry II.* Book II.
Robertſon's *Hiſtory of Charles V.* Vol. I. Note ix.
Hargrave's *Argument on the caſe of Sommerſet, a Negro.* Lond. 1772.

1. PERSONS are conſidered either in their NATURAL or CIVIL capacities.

2. In their NATURAL capacity, they are conſidered with regard to 1. LIFE. 2. Sex. 3. AGE.

3. In their CIVIL capacity, their State is denominated from a reſpect to 1. LIBERTY. 2. CITY. 3. FAMILY.

4. The firſt diviſion of Perſons, in a Civil conſideration, is into FREEMEN and SLAVES.

5. SLAVERY, in the Civil Law, had three Origins. 1. Captivity in War. 2. Birth. 3. The Sale of a Man's ſelf to another. None of theſe are juſtifiable cauſes of Slavery.

6. Ariſtotle's opinion of Natural Slavery is groundleſs.

7. SLAVES

7. SLAVES were 1. Ordinary. 2. Peculiar; otherwiſe called Vicarial.

8. The power of a Maſter over his Slave conſiſted in three things. 1. He could put him to death. 2. He could transfer him, by ſale or gift, to whom he pleaſed. 3. Whatever the Slave acquired belonged to his Maſter.

9. This power was greatly abridged by the later Emperors.

10. The decline of Domeſtic Slavery in Europe was greatly owing to the Chriſtian Religion. The Baptiſm of Heathen Slaves makes no alteration in their Civil Condition.

11. FREEMEN were 1. INGENUI. 2. LIBERTINI.

12. The Condition of the MOTHER determined the State of her Child, as to Freedom or Slavery.

13. The Law of England differed in this reſpect from the Civil Law.

14. A LIBERTINUS was one, who from a ſlave became free by MANUMISSION. The Rights of the former Maſter to the ſervices of ſuch a perſon were called *Jura Patronatûs*.

15. By the ancient laws of Rome, Liberty could only be conferred three ways. 1 *Cenſu*. 2. *Vindicta*. 3. *Teſtamento*.

16. Other leſs ſolemn ways of Manumiſſion were afterwards introduced by the Roman Emperors.

17. The ſeveral ways of Manumiſſion did not all confer the ſame degree of Freedom: But the *Libertini* were of three ſorts. 1. *Cives Romani*. 2. *Latini ſive Juniani*. 3. *Dedititii*. This diſtinction was aboliſhed by Juſtinian.

18. The *Lex Ælia Sentia*, which reſtrained a Maſter from manumitting his Slaves in certain caſes; and the *Lex Fuſia Caninia*, intended to limit Teſtamentary Manumiſſions; and the alterations in theſe Laws by Juſtinian; explained.

19. VILLENAGE, as formerly known in England, was a ſtate little better than Slavery among the Romans. The ſubjects of this ſtate, if males, were called

called VILLEINS; if females, NEIFS. A Villein was either *regardant* to a manor, or *in groſs*.

20. Villeins might be enfranchiſed by MANUMISSION: which was 1. Expreſs. 2. Implied.

21. Copyhold Tenures, now ſubſiſting in England, are deſcended from the ancient Villenage.

22. Villenage, though never *formally* aboliſhed by any ſtatute, was at laſt, inſenſibly, forgotten.

23. The revival of Domeſtic Slavery in America affords no proof, that the introduction of a new Slavery into England is now lawful.

CHAP. IV.

Of CITIZENS *and* STRANGERS; NATIVES *and* ALIENS; *by the Roman and Engliſh Laws.*

Heinecc. *A. R.* Appendix Libri Primi.
Grandeur et Decadence des Romains. Ch. 9.
Wood's *Inſt. of Civ. Law.* B. I. Ch. 2.
Blackſtone's *Comm.* B. I. Ch. 10.

1. THE ſecond diviſion of PERSONS, in a Civil conſideration, is into CITIZENS and STRANGERS. This diviſion is wholly omitted by Juſtinian in his Inſtitutions.

2. The perſons ſubject to the Roman Government were claſſed under four denominations. They were 1. CIVES. 2. LATINI. 3. ITALICI. 4. PROVINCIALES. Thoſe who neither belonged to the city of Rome, nor to any ſtate ſubject to the Romans, were called HOSTES and PEREGRINI.

3. No one could be a citizen of Rome and of any other city, at the ſame time. In what ſenſe St. Paul is ſaid to have been a citizen both of Rome and Tarſus.

4. By

4. By a Conſtitution of the Emperor Antoninus Caracalla, the privileges of a Roman Citizen were conferred on all the inhabitants of every part of the Roman Empire, who were INGENUI: And the ſame Privileges were afterwards extended, by Juſtinian, to the LIBERTINI.

5. Of the ſtates ſubject to the Roman Empire, ſome were MUNICIPIA, others PRÆFECTURÆ, others COLONIÆ.

6. Of NATIVES, ALIENS, and DENIZENS, by the laws of England. Of the *droit d' aubaine* or *jus albinatûs*, as practiſed in France.

CHAP. V.

Of the POWER *of the* FATHER.

Inſt. Lib. I. Tit. 9. 12.
Hoppii *Comm.* Lib. I. Tit. 9. 12.
Heinecc. *A. R.* } Lib. I. Tit.
——— *El. J. C.* } 9. 12.
Wood's *Inſt. of Civ. Law.* B. I. Ch. 2.
Eſprit des Loix. Liv. V. Ch. 7. Liv. VII. Ch. 10. 11.
Taylor's *El. of Civ. Law.* art. *Power of the Father.*
Grotius *de J. B. et P.* Lib. II. Ch. V.
Wood's *Inſt. of Laws of England.* B. I. Ch. 6.
Blackſtone's *Comm.* B. I. Ch. 16.

1. THE third diviſion of PERSONS, in their Civil capacity, is into PATRES-FAMILIAS and FILIOS-FAMILIAS.

2. The reciprocal duties of Parents and Children, by the Civil and Engliſh laws.

3. The POWER of a ROMAN FATHER conſiſted in three things. 1. He could put his child to death; which power formed a domeſtic tribunal in each family. 2. He could ſell him three times. 3. Whatever the Son acquired belonged to his Father.

4. The ſteps, by which this power was reduced by the Roman Emperors.

5. The

5. The Natural Death of the Father, and the Civil Death of either Father or Son, put an end to the *Patria Poteſtas.*

6. If the Father was taken captive, his power was ſuſpended during his captivity, and on his return revived by what was called *Jus Poſtliminii.*

7. The Father could put an end to his power by EMANCIPATION: the regulations made in this Ceremony by Juſtinian.

CHAP. VI.

Of MARRIAGE.

Inſt. Lib. I. Tit. 10.
Hoppii *Comm.* Lib. I. Tit. 10.
Heinecc. *A. R.* } Lib. I. Tit.
——— *El. J. C.* } 10.
Wood's *Inſt. of Civ. Law.* B. I. Ch. 2.
Eſprit des Loix. Liv. XVI.
Taylor's *El. of Civ. Law.* art. *Marriage.*
Grot. *de J. B. et P.* Lib. II. Ch. V.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 15.
Wood's *Inſt. of Laws of England.* B. I. Ch. 6.
Burn's *Eccl. Law.* Vol. II. p. 713—718. Ed. 4to. Title, *Wills.*
Blackſtone's *Comm.* B. I. Ch. 15.

1. THE *Patria Poteſtas* was acquired three ways. 1. By lawful MARRIAGE. 2. By LEGITIMATION. 3. By ADOPTION.

2. NUPTIÆ and MATRIMONIUM were different. The SOLENNES NUPTIÆ of the Romans were completed FARRE, COEMPTIONE, USU: and might be diſſolved DIFFARREATIONE, REMANCIPATIONE, USURPATIONE.

3. When the Marriage-Contract is ſaid to be formed by CONSENT alone, it was ſuppoſed to be ſuch a Conſent, as excluded, not only Error and Fraud, but Force and Fear.

4. IMPEDIMENTS to a juſt Marriage, by the Roman Law, were 1. Non-conſent of the Parent. How far

far this conſent is neceſſary by the Law of England. 2. Want of Age. 3. Want of Citizenſhip. 4. Natural defects, of Mind and Body. 5. Conſanguinity. 6. Affinity.

5. The Rules for computing DEGREES of Conſanguinity, in the RIGHT and OBLIQUE Lines, by the Civil and Canon and Engliſh laws.

6. GENERAL RULE concerning Marriages prohibited on account of Conſanguinity and Affinity: "All ſuch as are *Real* Parents and Children to each "other, or *in the place* of Parents and Children, are "forbidden to marry together.

7. In the RIGHT line, Marriages were prohibited *in infinitum*; whether the relation of parent or child were derived from nature, or introduced by adoption, and that diſſolved.

8. In the OBLIQUE line, Marriages of Brothers and Siſters, of the whole blood or half, natural or adopted, whilſt the adoption continued; as alſo of Uncles and Nieces, and of Aunts and Nephews, were forbidden: but from the time of the Emperor Claudius to that of Conſtantine, the marriage of a Brother's daughter had been allowed.

9. The Marriage of a Great Aunt, or the widow of a Great Uncle, though forbidden by the Roman, is allowed by the Engliſh laws.

10. The Marriages of firſt Couſins, which, at different times, had been both allowed and forbidden by the Emperors before Juſtinian, were by Him declared to be lawful.

11. Marriages in the RIGHT line were forbidden on account of Affinity no leſs than Conſanguinity. In the OBLIQUE line, the old Roman lawyers compared Affinity with Adoption, and made the ſame rules govern both; but the Conſtitutions of the Emperors forbad marriages of perſons related by Affinity in this line.

12. *Com-*

12. *Comprivigni*, or children by former marriages of a Huſband and Wife, might marry together.

13. The prohibitions of Marriage, on account of Conſanguinity and Affinity, extended equally to Freemen and Slaves.

14. Impediments to a juſt Marriage, by the Laws of England, are 1. Canonical. 2. Civil. The former make a Marriage voidable, by Sentence of Separation; which muſt be had during the life of the parties: the latter make a Marriage *ab initio* void.

15. EFFECTS of the Marriage-Contract are 1. Common to Huſband and Wife. 2. Peculiar to one only.

16. POLYGAMY was condemned by the Roman law, during the Republic, and by the Conſtitutions of the Emperors: And it is puniſhable by the Laws of England.

17. DIVORCES were 1. *Bona gratia.* 2. *Mala gratia.*

18. The tradition, that there was no inſtance of a Divorce in Rome, till the year of the city 525, is at leaſt a queſtionable piece of Hiſtory.

19. In England, Divorces are 1. Total, *a vinculo Matrimonii.* 2. Partial, *a menſa et thoro.*

CHAP. VII.

Of LEGITIMATION.

Inſt. Lib. I. Tit. 10. § 13.
Hoppii *Comm.* Lib. I. Tit. 10. § 13.
Heinecc. *A. R.* } L. I. Tit. 10.
——— *El J. C.* } Appendix.
Wood's *Inſt. of Civ. Law.* B. I. Ch. 2.
Burn's *Ecc. Law.* Title, *Baſtards.*
Blackſtone's *Comm.* B. I. Ch. 16.
——— *Law Tracts. On the Great Charter.* Introduction, p. lxxxiii—lxxxviii. 8vo.

1. LEGITIMATE Children were thoſe born in lawful wedlock; all others were conſidered as ILLEGITIMATE.

2. Il-

2. Illegitimate Children were of four ſorts. 1. Natural Children, or thoſe born in Concubinage. 2. Spurious. 3. *Filii Adulterini.* 4. *Inceſtuoſi.* The firſt of theſe were the only objects of Legitimation.

3. LEGITIMATION was procured three ways: 1. By a Subſequent Marriage. 2. By the natural Son being made a Decurion. 3. By Reſcript from the Emperor.

4. BASTARDS, by the laws of England, are ſuch children, as are born out of lawful wedlock: Nor will the Subſequent Marriage of the parents Legitimate ſuch children, as it would by the Civil and Canon Laws.

5. Children born ſo long after the death of the huſband, that, by the uſual courſe of nature, they could not be begotten by him, are Baſtards. The proceſs in England *de Ventre inſpiciendo* is exactly agreeable to the rules of the Civil Law.

6. Children born during wedlock may, in ſome caſes, be Baſtards.

7. Rights and Incapacities of Baſtards: The different ſenſes of the word *Mulier*, in the Engliſh law.

CHAP. VIII.

Of ADOPTION.

Inſt. Lib. I. Tit. 11.
Hoppii *Comm.* Lib. I. Tit. 11.
Heinecc. *A. R.* } Lib. I. Tit.
——— *El. J. C.* } 11.

1. ADOPTION was of two kinds, ARROGATION, and Adoption ſpecifically ſo called: the Ceremonies in both kinds explained.

2. Adoption *in ſpecie* was 1. *Plena.* 2. *Minus plena.*

3. He who arrogated or adopted a Son was to be older than that Son by 18 years; in the caſe of a Grandſon, he was to be older by 36 years.

4. Effects

4. Effects of Arrogation and Adoption.

5. Adoption was never practiſed in England, nor have we any laws concerning it.

6. In GERMANY there is a ſort of adoption, called *Unio ſeu Parificatio prolium*; by which children by former marriages of Huſband and Wife are made equal to one another, in regard to Succeſſion.

7. The Roman cuſtom of Adoption is frequently alluded to in the New Teſtament.

CHAP. IX.

Of GUARDIANSHIP.

Inſt. Lib, I. Tit. 13—26.
Hoppii *Comm.* Lib, I. Tit. 13—26.
Heinecc. *A. R.* } Lib. I. Tit.
——— *El. J. C.* } 13—26.
Wood's *Inſt. of Civ. Law.* B. I. Ch. 2.
Wood's *Inſt. of the Laws of England.* B. I. Ch. 6.
Burn's *Eccle. Law.* Vol. II. p. 536—542. Title, *Wills.*
Blackſtone's *Comm.* B. I. Ch. 8. 17. B. II. Ch. 5. 6. 19.
Sullivan's *Lectures on the Feudal and Engliſh Laws.* Lect. 12. 13.

1. ANOTHER diviſion of PERSONS, derived from the laſt of Parent and Child, is that of GUARDIAN and WARD. Guardianſhip was of two kinds. I. TUTELA. II. CURA. The Objects of the firſt kind are called PUPILS; of the ſecond MINORS. In England, the GUARDIAN performs the Offices of both TUTOR and CURATOR of the Roman laws.

2. In the Roman Guardianſhip, ſome things were peculiar to each kind, taken ſeparately; others belonged to both in common.

I.

3. TUTELA was of three ſorts. I. TESTAMENTARY. II. LEGAL. III. DATIVE.

4. I. In the TESTAMENTARY Tutelage, it was required, 1. That the perſon appointing ſhould be a Parent, who had the Child under Power. 2. The Child was to be an *Impubes*. 3. The Appointment was to be by a Laſt Will.

5. There

5. There are three kinds of Guardians in England. 1. By Common law: who are (1) by Nature. (2) for Nurture. (3) in SOCAGE. (4) in Chivalry. 2. By Statute law. 3. By particular Cuſtom. The Guardian by STATUTE Law anſwers to the TESTAMENTATY Tutor of the Romans.

6. II. When there was no Teſtamentary Tutor *tàm re quàm ſpe*, the LEGAL Tutelage took place.

7. The *Tutor Legitimus*, by the Civil law, was the neareſt relation by the Male ſide, to whom the Inheritance, in caſe of Inteſtacy, would deſcend. The name of ſuch relation was *Agnatus*.

8. The Legal Guardian in England is the neareſt relation, to whom the Inheritance, in caſe of Inteſtacy, does *not* deſcend.

9. Any ſuch change in the condition of an *Agnatus*, as deſtroyed the *Agnatio*, at the ſame time deſtroyed the Legal Tutelage.

10. Such a change of ſtate was called CAPITIS DIMINUTIO; and was of three ſorts. 1. *Maxima*. 2. *Media*. 3. *Minima*.

11. By a Conſtitution of Juſtinian, the Mother and Grandmother were ſometimes preferred to the Tutelage, in excluſion of the *Agnati*.

12. A ſecond ſpecies of the *Legitima Tutela* was that of the PATRON to his LIBERTUS: The Patron was expreſsly called, by the Decemviral Law, to the Succeſſion of his *Libertus*, dying inteſtate; and was therefore virtually called to the Tutelage alſo.

13. A third ſpecies was that of a PARENT to his EMANCIPATED CHILD: This was founded on the ancient Ceremony of Emancipation; by which the Parent was conſidered as a *quaſi-Patronus*, and the Child as his *quaſi-Libertus*.

14. A fourth ſpecies was that called FIDUCIARIA TUTELA: This related to one under the age of Puberty, who had been Emancipated by a Parent that was dead. The three examples are, 1. Of a Father

to

to his Son, Emancipated by the Grandfather. 2. Of a Brother to his Emancipated Brother. 3. Of the *Patruus* to an Emancipated Nephew.

15. WOMEN, by the Roman law, were under perpetual Tutelage. This *Tutela Muliebris* devolved, like that of Pupils, on the *Proximus Agnatus*; but might be transferred by him to the next in degree.

16. III. The DATIVE Tutelage was aſſigned by the Magiſtrate. 1. *Ex officio*. 2. When no Tutor by *Will* or *Law* was provided. The *Lex Atilia*, and *Lex Julio-Titia* explained.

17. The Regulations in the Dative Tutelage, made by the Emperors Claudius and Juſtinian.

18. The OFFICE of a Tutor conſiſted in three things. 1. In taking care of the Education of his Pupil. 2. In Adminiſtering his affairs. 3. In giving Authority to the acts of the Pupil. In England, the office of the Guardian is all Adminiſtration.

19. The Tutor was not obliged to give up his accounts, till after the expiration of his office. A contrary practice now generally obtains in England.

20. A Pupil, if very near the Age of Puberty, though he could not be under a *civil* obligation, might be under a *natural* one. In matters of Crimes and Offences, the rule, by the Civil and Engliſh laws, is, *Malitia ſupplet ætatem.*

21. In caſe of a Suit between Tutor and Pupil, the Prætor appointed another Tutor, in whoſe name the ſuit was carried on: Juſtinian changed this Prætorian Tutor into a Curator, ſpecially created for the purpoſe. The *prochein ami*, or next friend of the Minor, in England, ſupplies the place of this Curator, in the Civil law.

22. The *Tutela* was ENDED, 1. on the part of the Pupil; (1) by Puberty. (2) by Death, Natural or Civil. (3) by Arrogation. 2. On the part of the Tutor; (1) by Death, Natural or Civil. (2) by the office of the Magiſtrate; *volente Tutore, vel invito.*

II.

23. When the Tutela was at an end, the CURA began. In England, he, who moſtly reſembles the Roman Curator, is the Guardian, whom a Minor chuſes for himſelf, after he is 14 years of Age.

24. Whether a Curator could be given to a Minor againſt his will, is a queſtion among the Roman Lawyers. Hiſtory of Curation from its beginning.

25. Lunatics, and Prodigals who were reckoned *quaſi* Lunatics, were put under the government of Curators. In England, Idiots and Lunatics have Tutors aſſigned them to protect their *perſons*, and Curators to manage their *eſtates:* but no notice is taken of Prodigals, as in the Civil law.

26. In ſome particular caſes, Pupils, as well as Minors, were under the government of Curators.

27. The *Cura* was ENDED, 1. on the part of the Minor; (1) by his becoming a Major. (2) by the *Venia Ætatis.* (3) by Death, Natural or Civil. (4) by Arrogation. 2. on the part of the Curator; (1) by Death, Natural or Civil. (2) by the Office of the Magiſtrate; *volente Curatore, vel invito.*

III.

28. Before either Tutor or Curator could exerciſe his Office, he gave SECURITY for his fidelity, by what was called *Cautio Fide-juſſoria.* When there were ſeveral Tutors or Curators, any one that offered the Fidejuſſory Caution had the acting part, in preference to the reſt.

29. If the Magiſtrate neglected to take Sureties, or took ſuch as were not good, he was liable to the *Actio Subſidiaria*, which extended to his Heirs.

30. EXCUSES, by which Tutors and Curators were relieved from the burthen of Guardianſhip, may be reduced to three heads. 1. *Ob Privilegium.* 2. *Impotentiam.* 3. *Exiſtimationis periculum.* The Laws of England are ſilent concerning the Excuſes of Guardians, no one with us being compelled to take the office.

31. Tutors

31. Tutors and Curators were liable to be REMOVED by the Magiſtrate, *tanquam Suſpecti.* Guardians at Common Law may be removed in England; but there is no inſtance of the removal of a Statute or Teſtamentary Guardian.

CHAP. X.

Of CORPORATIONS.

Dig. Lib. III. Tit. 4.
—— Lib. XLVII. Tit. 22.
Wood's *Inſt. of Civ. Law.* B. I. Ch. 2.
Taylor's *El. of Civ. Law.* art. *S. C. Marcianum.* p. 567—573. 4to.
Wood's *Inſt. of Laws of Eng.* B. I. Ch. 8.
Blackſtone's *Comm.* B. I. Ch. 18.

1. BESIDES the former diviſions of Perſons, conſidered in their Natural and Civil Capacities; there are alſo ARTIFICIAL Perſons, called in the Civil law UNIVERSITATES and COLLEGIA; and in the laws of England, Bodies politic, or CORPORATIONS.

2. Corporations might be CREATED by the voluntary convention of their members, provided ſuch convention were not contrary to law. In England, they may ſubſiſt four ways. 1. By Common Law. 2. Preſcription. 3. Letters Patent of the King. 4. Act of Parliament.

3. Three perſons, at leaſt, were required to conſtitute a Corporation; though it could ſubſiſt, if the community were afterwards reduced to one. In England, Corporations are SOLE or AGGREGATE: And are further divided into 1. LAY; which are (1) Civil. (2) Eleemoſynary. 2. SPIRITUAL. 3. MIXT.

4. Corporations were poſſeſſed of various powers. 1. They had a common Name, and Seal. 2. They

could ſue or be ſued by their common name. 3. Could borrow money by their *Syndic*. 4. Take lands, with ſpecial privilege from the Emperor. 5. Make laws for their own government, called *Statutes*, and in England *By-laws*, provided they were not contrary to the law of the land.

5. In Corporations, the act of the major part was eſteemed the act of all; but this major part, by the Civil law, muſt have conſiſted of two thirds of the whole. In England, the act of any Majority is eſteemed the act of the whole body, notwithſtanding the Private Statutes of any Corporation to the contrary.

6. A Corporation, as ſuch, could not commit Offences or Crimes; but delinquents, in their perſonal capacity, were anſwerable for any miſbehaviour. The ſame practice obtains in England.

7. Corporations might be DISSOLVED, 1. By Forfeiture. 2. By the Death of all their Members. In England, a Sole Corporation can only be diſſolved by Surrender of its Franchiſes to the King, or by Act of Parliament.

BOOK

BOOK THE SECOND.

Of the RIGHTS *of* THINGS.

CHAP. I.

Of PROPERTY *in general.*

Inſt. Lib. II. Tit. 1. pr. § 1—10.
Hoppii *Comm.* Lib. II. Tit. 1. pr. § 1—10.
Heinecc. *A. R.* Lib. II. Tit. 1. pr. § 1—20.
——— *El. J. C.* Lib. II. Tit. 1. § 310—339.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 1.
Taylor's *El. of Civ. Law.* art. *Property.* p. 448—479.
Grotius *de J. B. et P.* Lib. II. C. II. III.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 3. 5.
Wood's *Inſt. of Laws of Eng.* B. II. Ch. 1. 5.
Blackſtone's *Comm.* B. I. Ch. 1. 2. 3. 24.

1. THE ſubjects of Property are called RES, THINGS.

2. In THINGS are to be conſidered, I. Their KINDS. II. The RIGHTS, which may be acquired in them. III. The WAYS of acquiring thoſe Rights.

3. I. Things were 1. *extra patrimonium*, that is, incapable of being poſſeſſed by ſingle perſons, excluſively of others. 2. *in patrimonio*, that is, capable of being ſo poſſeſſed.

4. Things *extra patrimonium* were of four ſorts. 1. Things COMMON. 2. Things PUBLIC. 3. Things belonging to a Society or Corporation, called RES UNIVERSITATIS. 4. Things conſecrated to Religious Uſes, called (1) *Res Sacræ.* (2) *Religioſæ.* (3) *Sanctæ.*

5. Things *in patrimonio*, called RES SINGULORUM, were of two ſorts. 1. Corporeal; which included (1) Moveables. (2) Immoveables. 2. Incorporeal.

6. By the laws of England, THINGS are diſtributed into two kinds. 1. Things REAL. 2. Things PERSONAL. Things Real conſiſt in 1. Lands. 2. Tenements. 3. Hereditaments; which laſt are (1) Corporeal. (2) Incorporeal. Things Perſonal are called CHATTELS; which are 1. Chattels Real. 2. Chattels Perſonal.

7. II. The SUBSTANCE of Things, in the earlieſt ages, belonged to mankind in common; yet even then, there was a temporary Right to the USE, which ſupplied the place of Property.

8. The inconveniences of ſuch a Communion of goods occaſioned, in time, the introduction of a permanent and excluſive Right to the SUBSTANCE as well as USE of Things. This permanent and excluſive Right is called PROPERTY.

9. Property in Things might be 1. In POSSESSION. 2. In ACTION. The former is called DOMINION, or *Jus in Re:* the latter, OBLIGATION, or *Jus ad Rem.* The ſame diſtinction obtains in England, with regard to Property in Things Moveable, or Chattels Perſonal.

10. Dominion in Things is 1. SIMPLE, called *Dominium Plenum.* 2. QUALIFIED, called *Dominium minus Plenum.* The latter is of two kinds. (1) *Directum.* (2) *Utile.*

11. Other diviſions of *Dominium* into *Eminens et Vulgare*; *Quiritarium et Bonitarium*; explained.

12. III. The WAYS of acquiring a Right to Things are derived, I. From the Law of NATURE or NATIONS. II. From the CIVIL Law.

CHAP.

CHAP. II.

Of the NATURAL *Modes of acquiring Property.*

Inſt. Lib. II. Tit. 1. § 11—47. Tit. 8.
Hoppii *Comm.* Lib. II. Tit. 1. § 11—47. Tit. 8.
Heinecc. *A. R.* Lib. II. Tit. 1. § 21—29. Tit. 8.
——— *El. J. C.* Lib. II. Tit. 1. § 340—384. Tit. 8.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 3.
Grotius *de J. B. et P.* Lib. II. C. III. VIII. X.
Wood's *Inſt. of Laws of Eng.* B. II. Ch. 3.
Blackſtone's *Comm.* B. I. Ch. 8. B. II. Ch. 16. 19. 20. 21. 25. 26. 27.
Sullivan's *Lectures on the Feudal and Engliſh Laws.* Lect. 12. 15. 17.

1. THE NATURAL Modes of acquiring a Right to Things are three. I. OCCUPANCY. II. ACCESSION. III. TRADITION.

2. I. OCCUPANCY is the taking poſſeſſion of ſuch Things as had been poſſeſſed by no one before, called RES NULLIUS.

3. Under the head of Occupancy are conſidered 1. The Right of Property in ANIMALS. 2. CAPTURES in WAR. 3. Things FOUND.

4. The right of Property in ANIMALS is different, according to their different kinds. Animals are of three ſorts; *feræ*, *manſuetæ*, *manſuefactæ naturæ*.

5. The Right of Property in Animals *feræ naturæ* may be reſtrained by poſitive laws. Theſe reſtrictions may regard 1. the Place. 2. the Perſons. 3. the Animals.

6. Occupancy in WAR extends both to the *goods* and *perſons* of enemies. Captives taken in War, recovering their liberty, were reinſtated in their ancient rights, by the fiction called *Jus Poſtliminii*.

7. Occupancy in Things FOUND relates 1. to ſuch things as never had an owner: as precious ſtones, gems, &c. found on the *ſurface* of the earth or ſea.

2. to

2. to things which ceaſe to have an owner: as TREASURE TROVE, and DERELICTS.

8. TREASURE TROVE is treaſure hidden *in* the earth or other ſecret place, the owner being unknown.

9. DERELICTS are Things wilfully abandoned by the owner, with an intention to leave them for ever. In England, there is no ſuch thing as a Derelict. Of WAIFS and ESTRAYS in the Engliſh laws.

10. Things loſt by Negligence, or Chance, or thrown away upon Neceſſity, are not Derelicts. The *Lex Rhodia de Jactu*; * and the law of England concerning WRECKS, and the goods called *jetſam*, *flotſam*, and *ligan*, explained.

11. Real Property, by the law of England, cannot now be acquired by the Title of *Common* Occupancy; although that of *Special* Occupancy ſtill ſubſiſts: but this does not extend to ſuch eſtates as are Copyhold.

12. II. ACCESSION is the Right of acquiring the increaſe or improvements made in things that are our own: And is 1. NATURAL. 2. INDUSTRIAL. 3. MIXT.

13. Natural Acceſſions are 1. The Brood of female Slaves and Cattle. 2. River-Increments or Alluvions. 3. Lands acquired by the Force of a River. 4. Iſlands riſing in the Sea, or in a Public River. 5. Channels deſerted by a River.

14. The Roman laws concerning Natural Acceſſions have been generally adopted by the laws of England: But in the caſe of an Iſland riſing in the Sea, where the Civil law gives it to the firſt occupant, our law gives it to the King.

15. INDUSTRIAL Acceſſions are 1. Specification, or producing a new form from another's materials. 2. Conjunction, where two things are joined together, their ſubſtances remaining diſtinct and ſeparate. 3. Confuſion, or the mixture of Liquids. 4. Commixtion, or the mixture of Solids. 5. Building; (1) on

* D. 14. 2.

on a man's own ground, with another's materials. (2) on another's ground, with his own materials. 6. Writing. 7. Painting.

16. MIXT Acceſſions are 1. Planting. 2. Sowing. 3. The Fruits gathered, and conſumed, by the *bona fide* poſſeſſor of another's property.

17. The doctrine of the Roman and Engliſh laws on Induſtrial and Mixt Acceſſions; and the opinion of Grotius on this ſubject; examined.

18. III. By the old Roman laws, Alienation of things Corporeal was of two kinds. 1. MANCIPATION. 2. TRADITION. The former related to ſuch things as were called *Res Mancipi*; the latter to the *Res Nec Mancipi*. Juſtinian aboliſhed the diſtinction; and gave to TRADITION, or ſimple delivery, all the effects of the ancient Mancipation.

19. No Tradition was good, unleſs 1. preceded by a ſufficient cauſe or *conſideration*. 2. made by one who had the right to alienate. It might happen in ſome caſes, that the real owner could not alienate; and he, who was not the owner, could.

20. Tradition was three-fold. 1. True. 2. Feigned; which was (1) *brevi manu*. (2) *longa manu*. 3. Symbolical.

21. Ways of Alienation of Real Property, in England, by Deed, Feoffment with Livery of Seizin, Leaſe and Releaſe, Recoveries, Fines; explained.

CHAP.

CHAP. III.

Of RIGHTS *or Things Incorporeal; and of Real and Perſonal* SERVICES.

Inſt. Lib. II. Tit. 2—5.
Hoppii *Comm.* Lib. II. Tit. 2—5.
Heinecc. *A. R.* } Lib. II. Tit.
——— *El. J. C.* } 2—5.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 2.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 4.
Blackſtone's *Comm.* B. II. Ch. 3. art. IV. and Ch. 8.

1. RIGHTS in Things are Incorporeal, and capable only of an improper or *quaſi*-poſſeſſion; which is proved from the allowed Uſe and Exerciſe of thoſe Rights.

2. SERVICES are Rights, which one perſon has in the Land or Building of another; by which the owner is limited in the uſe of his property, and obliged either to *ſuffer*, or *not to do* ſomething in his own Land or Building, for the benefit of another perſon, who has a claim upon it.

3. Services are of two kinds. I. REAL. (which are ſometimes called PREDIAL) II. PERSONAL.

4. I. REAL Services are Rights, which one Eſtate owes to another Eſtate: theſe are 1. RURAL. 2. CITY Services.

5. Rural Services are thoſe belonging to Lands, and are all affirmative. City Services are thoſe, which belong to Buildings for the habitation of Men; and are partly affirmative, partly negative.

6. In every Real Service it was required, that the two Eſtates ſhould be in diſtinct Proprietors: whenever the owner of either became the owner of both, the Service was extinct.

7. II. PERSONAL Services are Rights, which are owing from an Eſtate to a Perſon. The principal of theſe

theſe are 1. USUFRUCT. 2. USE. 3. HABITATION.

8. USUFRUCT is a Right of uſing and enjoying the profits of a thing belonging to another, without impairing the ſubſtance.

9. An Uſufruct properly had place in ſuch things only, as could be uſed without being conſumed; but might be even in things which periſhed in the uſing, called RES FUNGIBILES.

10. If an Uſufructuary died ever ſo little before harveſt, his eſtate, like that of an Incumbent in England with regard to Tithes, was immediately determined; and his Heir had no right to the fruits: But if the Uſufructuary had ſowed his land, the Heir could deduct for ſeed and expence of tillage. A like indulgence is allowed to a Tenant for life, by the laws of England.

11. USE is a Right of uſing a thing belonging to another, for the purpoſe of ſupplying the daily wants and neceſſities of the uſer, without prejudice to the ſubſtance.

12. HABITATION is a right to dwell in the Houſe of another, without hurt to the building.

13. An Uſe, in the law of England, is of as great extent as an Uſufruct in the Civil law; and he that hath the Uſe of LAND hath the Land itſelf: But our laws are ſilent concerning ſuch Uſes and Rights of Habitation, as were among the Romans.

CHAP.

CHAP. IV.

Of the Perſons, by whom Property might be acquired; and of the PECULIUM *of a Son under Power.*

Inſt. Lib. II. Tit. 9.
Hoppii *Comm.* Lib. II. Tit. 9.
Heinecc. *A. R.* } Lib. II. Tit.
——— *El. J. C.* } 9.
Taylor's *El. of Civ. Law.* art. *Power of the Father.* p. 395—397.

1. PROPERTY might be acquired not only immediately, by a man's ſelf; but alſo mediately, by others whom he had under power; as a Son and a Slave.

2. Yet both a Son and a Slave were allowed to have ſome little Property of their own, which was called PECULIUM.

3. The Peculium of a Son was 1. MILITARY. 2. PAGAN. The Military Peculium was (1) *Caſtrenſe.* (2) *Quaſi-Caſtrenſe.* The Pagan Peculium was (1) *Profectitium.* (2) *Adventitium.*

4. Property might be acquired by means of a Slave, in whom a man had only the Uſufruct.

CHAP.

CHAP. V.

Of the CIVIL *Modes of acquiring Property: And, Firſt, of* USUCAPION *or* PRESCRIPTION; *and of* DONATION.

Inſt. Lib. II. Tit. 6. 7.
Hoppii *Comm.* Lib. II. Tit. 6. 7.
Heinecc. *A. R.* } Lib. II. Tit.
——— *El. J. C.* } 6. 7.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 4.
Grotius *de J. B. et P.* Lib. II. C. IV.
Wood's *Inſt. of Laws of Eng.* B. II. Ch. 3. 6.
Burn's *Eccl. Law.* Title, *Donatio mortis causâ:* and Vol. II. p. 528. Title, *Wills.*
Blackſtone's *Comm.* B. II. Ch. 8. 17. 29. 30. B. III. Ch. 20.

1. THE CIVIL Modes of acquiring a Right to Things, were, chiefly, three. I. USUCAPION or PRESCRIPTION. II. DONATION. III. SUCCESSION.*

2. I. USUCAPION was the acquiſition of Property, founded on continual poſſeſſion, during a time expreſſed by law. PRESCRIPTION was an *Exception*, by

* There is another diſtribution of the CIVIL Modes of acquiring a Right to Things, mentioned in the Inſtitutions, into UNIVERSAL and SINGULAR. The Univerſal Modes are thoſe, by which the whole Rights of one man are transferred to another, in the groſs, by one acquiſition. Theſe are ſix in number. 1. HÆREDITAS, *tum ex Teſtamento, tum ab Inteſtato.* 2. BONORUM POSSESSIO. 3. *Acquiſitio per* ARROGATIONEM. 4. BONORUM ADDICTIO LIBERTATUM SERVANDARUM CAUSA. 5. *Acquiſitio per* SECTIONEM BONORUM. 6. *Acquiſitio ex* SENATUS-CONSULTO CLAUDIANO. The ſingular Modes are thoſe, by which the Property of one ſingle Thing is transferred. Theſe are four in number. 1. USUCAPIO. 2. DONATIO. 3. LEGATUM. 4. FIDEI-COMMISSUM SINGULARE. This diſtribution is not without its uſe: But the diviſion I have laid down is more commodious, and better adapted to the order, in which the ſeveral articles are treated of in the Inſtitutions, than that of Juſtinian himſelf.

by which he, who had poſſeſſed a thing for a certain length of time, defended himſelf in the poſſeſſion againſt the true owner.

3. Uſucapion and Preſcription differed from each other, 1. In the Things acquired. 2. In the Time. 3. In the Effect. Theſe diſtinctions were aboliſhed by Juſtinian; and Preſcription now comprehends the meaning of both terms.

4. In order to acquire a thing by Preſcription, the poſſeſſion muſt be 1. *bona fide.* 2. founded on a juſt cauſe or title. 3. uninterrupted. 4. for a lawful time. 5. the thing itſelf muſt be capable of preſcription.

5. The *Leges Atinia, Julia, Plotia*; and the alterations in the Decemviral law, made by Juſtinian; explained.

6. Services, and other Incorporeal Things, might be gained by Preſcription.

7. Preſcriptions, in the law of England, are of two kinds. 1. Thoſe which enable a man to acquire a property. 2. Thoſe which ſecure him from loſs and puniſhment.

8. By the Common law of England the time of Preſcription is that, of which there is no memory of man or record to the contrary: yet in many inſtances leſs time is ſufficient, both by the Common law, and by acts of Parliament.

9. The maxim of the Common law of England, with reſpect to the Poſſeſſions of the Crown and Church, expreſſed by the words, *Nullum Tempus occurrit Regi vel Eccleſiæ*; and the Statutes of Limitation, (21 James I. and 9 George III.) by which that Maxim has been aboliſhed, in the caſe of the Crown; explained.

10. II. DONATION is of two kinds. 1. PROPER. 2. IMPROPER.

11. A PROPER Donation is, when one from mere liberality beſtows any thing on another, not being compelled to it by law.

12. To the perfection of a Gift were required 1. The Conſent of the Donor and Donee. 2. A Capacity in one

one to give, and the other to receive. 3. A Capacity in the Thing to be given. 4. Delivery. 5. Gifts, exceeding a certain ſum, were to be publicly regiſtered, at the time when made.

13. In the law of England, DONATION uſually refers to Real Property, or to Corporeal Hereditaments; and ſignifies the Conveyance of an Eſtate-tail. The conveyance of an Incorporeal Hereditament is called a GRANT. In Grants of Perſonal Property, an equivalent or conſideration is always implied. GIFTS are wholly gratuitous; and may be in Word, in Law, or by Deed.

14. Gifts, perfectly made, might be RECALLED: 1. for Ingratitude. 2. if Inofficious. 3. in one caſe, if afterwards the giver had Children. In England, Gifts, made abſolutely, are Irrevocable.

15. IMPROPER Gifts are 1. thoſe made *propter nuptias*. 2. *mortis cauſa*.

16. A Gift *propter nuptias* was a ſettlement, which the Huſband made on his Wife, by way of ſecurity for her Dos, or Marriage portion. This Dos was 1. *Profectitia*. 2. *Adventitia*. The Huſband could not alienate his Wife's Dos, even with her conſent.

17. In England, where a Real Eſtate is brought by the Wife, the Huſband only gains a Title to the rents and profits, during coverture; unleſs, by the birth of a Child, he become Tenant for life *by the curteſy*. Chattels Real are given to the Huſband conditionally, if he ſurvives his wife; yet, while he lives, he can alienate them at pleaſure: Chattels Perſonal, if reduced to *poſſeſſion*, are given to the Huſband abſolutely, by the Marriage; and the Wife has property in nothing but her *paraphernalia*, or wearing apparel.

18. Dos, in the law of England, is not uſed to ſignify the money or land brought by the Wife in Marriage; but means that part of the Huſband's Lands, (uſually a third) which the Wife has, by Common law, after his deceaſe. But a ſettlement on the wife,

previous to the Marriage, which is called a JOINTURE, bars the Dower at Common law.

19. A Gift *mortis cauſa* is one made in proſpect or contemplation of death: In what reſpects this differs from a Legacy. Donations of this kind are not unknown in England.

20. III. SUCCESSION is the Right of coming into that eſtate, Real or Perſonal, which a deceaſed perſon had at the time of his death.

21. Such Succeſſion might take place three ways. I. By TESTAMENT. II. By LAW. III. By the BONORUM POSSESSIO granted by the Prætor.

CHAP. VI.

Of SUCCESSION *by* TESTAMENT.

Inſt. Lib. II. Tit. 10--19. Tit. 25.
Hoppii *Comm.* Lib. II. Tit. 10—19. Tit. 25.
Heinecc. *A. R.* Lib. II. Tit. 10—13. Tit. 14. Tit. 15. 16. Tit. 17—19. Tit. 23—25. § 11—16.
——— *El. J. C.* Lib. II. Tit. 10—19. Tit. 25.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 4.
Taylor's *El. of Civ. Law:* art. *Property.* p. 515—537.
Wood's *Inſt. of Laws of England.* B. II. Ch. 3. 6.
Burn's *Eccl. Law.* Vol. II. Title, *Wills.*
Blackſtone's *Comm.* B. II. Ch. 1. 23. 32.

1. PROPERTY naturally ceaſes at the death of the Proprietor; but, by the law of many Societies, may be continued by him, after his deceaſe, in ſuch perſons as he ſhall expreſsly name.

2. A TESTAMENT, in the Roman law, is the legal declaration of a man's intentions, which he wills to be performed upon the event of his death, with the direct appointment of an HEIR.

3. In

3. In England, the diſpoſal of REAL Property by a laſt Will is called a DEVISE; and the word TESTAMENT, ſtrictly ſpeaking, is limited to the diſpoſal of Chattels or PERSONAL Property, with the appointment of an EXECUTOR.

4. In TESTAMENTS are to be conſidered I. Their ORIGINAL and ANTIQUITY. II. Their KINDS. III. The PERSONS capable of making a Teſtament. IV. The THINGS which a Teſtament ought to contain, to make it valid in law. V. The ways of AVOIDING a Teſtament.

5. I. The Power of making Private Teſtaments was not allowed among the Romans, till the laws of the 12 Tables.

6. The power of Deviſing LANDS ſubſiſted in England before the Conqueſt, and till about the reign of Henry II. when it, generally, ceaſed, in conſequence of the Feudal Tenures: the doctrine of USES revived this power; and the Statute of Uſes (27 Hen. VIII.) again, accidentally, checked it: this occaſioned the Statute of WILLS, (32 & 34 Hen. VIII.) which expreſsly conferred the Right of Deviſing, but with ſome reſtrictions with regard to lands held by Knight's Service: the alterations of Tenures in the reign of Charles II. aboliſhed theſe reſtrictions; and the power of Deviſing was then made to extend to the whole of a man's Landed Property. But Copyhold lands cannot even now be deviſed without licence from the Lord.

7. By the Common law of England, a man could only bequeath one third of his PERSONAL Eſtate by Teſtament; the other two thirds being reſerved for his Wife and Children; whoſe ſhares were called their *Reaſonable Part:* but by modern Statutes, a man may now bequeath the whole of his Chattels, as freely as he can deviſe the whole of his Landed Property.

8. II. Before the laws of the 12 Tables, a Teſtamentary Heir might be made two ways. 1. In the form of a Legiſlative act, COMITIIS CALATIS. 2.

IN PROCINCTU, by ſuch perſons as belonged to the army.

9. The 12 Tables gave an abſolute power to every man, to make the law of his own Succeſſion; but preſcribed no *Form*.

10. As a Teſtament was an Alienation of the Teſtator's Property and Family after his death, the Form of Mancipation, uſed in other transfers of Property or Family, was followed in this; which occaſioned a third kind of Teſtament, PER ÆS ET LIBRAM.

11. Afterwards, when Teſtaments came to be in Writing, the Prætor took away the Ceremony of the Symbolical Sale; requiring no more to the validity of a Will than ſeven Witneſſes, (inſtead of five required before) and their Seals: This was called *Teſtamentum* PRÆTORIUM.

12. This regulation was followed by another and the laſt, from which was formed the *Teſtamentum* MIXTUM: ſo called, becauſe made up of three ſorts of law, the Civil and the Prætorian law, and the Conſtitutions of the Emperors.

13. A Roman Teſtament was 1. SOLEMN. 2. PRIVILEGED: and both were either WRITTEN, or NUNCUPATIVE.

14. In a SOLEMN WRITTEN Teſtament it was required, that it ſhould be 1. written, or ſubſcribed, by the Teſtator. 2. ſubſcribed, and ſealed, by ſeven perſons, all freemen, citizens of Rome, 14 years of age at leaſt, in the ſight and hearing of the Teſtator, and ſolemnly required to bear Witneſs. 3. that the whole ſhould be done *uno contextu*.

15. The *Condition*, or poſitive capacity, of the Witneſſes was to be judged of, at the time of their atteſtation; yet, by an equitable conſtruction, general reputation was ſufficient.

16. Neither the Heir, nor any of his Family, could be Witneſſes; but Legatees, and *Fide-committees*, might.

17. The omiſſion of any ſolemnity in a Written Un-

Unprivileged Will made the whole invalid. Whether, in caſe of a Will defective in Form, the Heir at Law be bound in Conſcience to reſtore the inheritance to the Teſtamentary Heir; examined.

18. In Deviſes of REAL Eſtates in England, it is required that they be 1. in writing, ſigned by the Deviſor himſelf, or ſome other in his preſence, and by his direction. 2. ſubſcribed by three credible Witneſſes at leaſt, in preſence of the Deviſor. A Legacy given, in ſuch a Will, to any of the Witneſſes, is void; and the Will itſelf, in other reſpects, is good: But Creditors are held to be credible Witneſſes, though the Real Eſtate be charged with payment of Debts*.

19. Teſtaments of CHATTELS in England, if written in the Teſtator's own hand, without his name, or ſeal, or witneſſes preſent; and even if written in another hand, and never ſigned by the Teſtator, if proved to have been agreeable to his inſtructions; are good. But no Legatee is eſteemed a credible Witneſs for the validity of ſuch a Will, till either the value of his Legacy has been paid him, or he has renounced it.

20. In a SOLEMN NUNCUPATIVE Teſtament it was required, that the Teſtator ſhould declare his Will, by word of mouth, before ſeven witneſſes, ſpecially aſked to atteſt it.

21. In England, no Nuncupative Will is good, where the eſtate bequeathed exceeds 30 pounds, unleſs 1. made in the laſt ſickneſs of the Teſtator. 2. at his own houſe; except ſurpriſed by illneſs, when abroad. 3. proved by three perſons preſent, ſpecially required to bear Witneſs. 4. put into writing, within ſix

* See the act of 25 Geo. II. c. 6. and the caſe of Windham *verſus* Chetwynd, 31 Geo. II. 1757, in Burrow's Reports, Vol. I. p. 414. with the opinion of the Court of King's Bench, delivered by Lord MANSFIELD; where the regulations of the Engliſh and Roman Laws, concerning Teſtaments in general, and the Credibility of Witneſſes to Teſtaments in particular, are explained at large, with an erudition and accuracy, peculiar to that GREAT LAWYER.

ſix days from the making, if proved by the Witneſſes after ſix months. Nor will a Nuncupative Will revoke a precedent Written one, unleſs reduced to writing in the life time of the Teſtator, and read over to him, and approved.

22. PRIVILEGED Teſtaments were thoſe, which were valid without the Formalities required in ſuch as were Solemn. Among theſe, the MILITARY Teſtament was the chief.

23. The Privilege of Unſolemn Teſtaments granted to Soldiers extended only to ſuch as were in actual ſervice: and a Will ſo made continued in force a whole year after their diſmiſſion from the army.

24. Soldiers and Sailors, in England, have the Privilege of making Informal Teſtaments.

25. Other inſtances of Privileged Teſtaments were 1. thoſe that were Publicly Regiſtered. 2. thoſe made by Parents for the benefit of their Children. 3. by Ruſtics. 4. in time of a Plague. 5. for Pious Cauſes. In England, ſeveral Charitable Deviſes have been adjudged good as *Appointments*, which were not valid as Teſtamentary Diſpoſitions.

26. CODICILS were unſolemn Wills, which contained no appointment of an Heir; and might be made by one that died Teſtate or Inteſtate.

27. Codicils differed from Teſtaments 1. in their Formalities. 2. in their Uſe. In England, the diſtinction between them is little more than nominal.

28. A Will defective in Form might often be ſupported by the force of a Codicillary Clauſe: in England, ſuch a clauſe is of no uſe.

29. Codicils in England are either Written or Nuncupative; and, when regularly atteſted and executed, may be proved as Wills are.

30. III. All Perſons are capable of making a Teſtament, unleſs diſabled 1. by their State and Condition. 2. Want of Diſcretion. 3. Criminal Conduct.

31. Perſons diſabled by their State and Condition were 1. a Son under Power. 2. Slaves. 3. Strangers. 4. Deaf

4. Deaf and Dumb perſons. 5. Priſoners of War, during their captivity: but a Will made before captivity was good, whether the captive returned, or died with the enemy.

32. In England, the power of a Father is no Impediment to a Child's Teſtament: But the power of the Huſband will vitiate a Wife's Teſtament of Chattels, unleſs made by his conſent; and ſhe cannot deviſe Lands, even with her Huſband's conſent.

33. Perſons diſabled by want of Diſcretion were 1. thoſe under the age of Puberty. 2. Madmen. 3. Prodigals.

34. In England, a male of fourteen years of age, and a female of twelve, may make a Will of a Perſonal eſtate; but neither of them can deviſe Lands till the age of twenty one.

35. Perſons diſabled by Criminal Conduct were 1. Traitors. 2. Hereticks. 3. Inceſtuous. 4. Libellers, &c. Certain Criminous perſons are incapable of making a Teſtament, in England.

36. IV. The appointment of an HEIR to repreſent the Teſtator was an *internal* ſolemnity, which made the eſſence of a Roman Teſtament.

37. He is called Heir, in the Civil law, who ſucceeds to the *whole* eſtate of the deceaſed, Real or Perſonal, without diſtinction. By the law of England, he is properly HEIR, who ſucceeds to the *Real* Eſtate, by Right of *Blood*; and he that ſucceeds to the *Perſonal* Eſtate, by *Will*, is called EXECUTOR.

38. There were three kinds of Heirs, in the Roman law. 1. NECESSARII. 2. SUI ET NECESSARII. 3. EXTRANEI. In England, all perſons are capable of being Executors, who are capable of making Wills, and many others beſides.

39. NECESSARY Heirs were the Teſtator's Slaves. Effects of the appointment of a Slave for Heir, in the caſes of *Servus proprius*, *alienus*, *communis*, *hæreditarius*.

40. *Hæredes* SUI ET NECESSARII were all the

Children of the Teſtator, of whatever ſex or degree, born or poſthumous.

41. By the old Civil law, if a Father neither inſtituted his Son Heir, nor diſinherited him *by name*, the Will was void: but the ſame omiſſion, in the caſe of a Daughter, or of a Grandſon by a Son or by a Daughter, did not hurt the Will.

42. Poſthumous Children were of three ſorts. 1. *Sui.* 2. *Alieni.* 3. *Quaſi-Poſthumi.*

43. The birth of a Poſthumous Son or Daughter; (which was called *Agnatio Sui Hæredis*) or of a Grandſon born after the death of the Grandfather, and ſucceeding into the place of his Father; (which was called *Quaſi-Agnatio Sui Hæredis*) would regularly have voided the Will of a Parent, which was good at the time when made. The Form, contrived by *Gallus Aquilius*, by which ſuch a Grandſon might be inſtituted *conditionally* *; and the *Lex Julia Vellæa*, with regard to the inſtitution of the *Quaſi-Poſthumi*; explained.

44. In the diſinheriſon of Poſthumous Children, the Males were to be diſinherited *by name*; and Females *inter cæteros*, with a Legacy.

45. By the new law, as reformed by Juſtinian, all children, of whatever ſex or degree, born or poſthumous, were to be inſtituted or diſinherited *by name*.

46. In England, a Teſtator may omit or exclude his own children by his Will, and appoint others to be his Heirs or Executors, as he pleaſes: nor does the birth of a Poſthumous child at all affect the Will of a Father.

47. EXTRANEOUS Heirs were all thoſe, who were neither the Slaves, nor the Children of the Teſtator: theſe were ſometimes called *Voluntary* Heirs.

48. Thoſe only could be Extraneous Heirs, who had

* The Form was this: FILIUS *meus Hæres eſto. Si Filius meus vivo me morietur,* TUNC, *ſi quis mihi ex eo* NEPOS, *poſt mortem meam, in decem menſibus proximis quibus Filius meus moreretur, natus erit, Hæres eſto.* See D. 28. 2. 9.

had a capacity to accept the inheritance, both at the time of making the Will, and at the time of the Teſtator's death.

49. A Teſtator might inſtitute one Heir, or more Heirs than one: but no perſon, except a Soldier, by the Roman law, could die partly Teſtate, and partly Inteſtate.

50. Where one Heir only was inſtituted, he ſucceeded to the whole Inheritance, whether he were inſtituted ſimply, or to a part. The whole Inheritance was called AS; it's diviſions and ſubdiviſions explained.

51. When a Teſtator inſtituted more Heirs than one, he might 1. inſtitute them all ſimply. 2. inſtitute ſome with parts, ſome without. 3. allot to each his reſpective part.

52. The Inſtitution of Heirs might be Abſolute, or Conditional. Conditions were 1. Caſual. 2. Poteſtative. 3. Mixt: And were further divided into Poſſible and Impoſſible.

53. An Heir could not be inſtituted *from* a certain time, or *till* a certain time: but this law does not obtain in England, with regard to an Executor.

54. An Heir was obliged to make ſome *declaration* of his accepting of the Inheritance.

55. By the old law, the Heir was bound to acquit all the burthens of the inheritance, if he once accepted; and therefore had a certain time allowed to *deliberate*, whether he would take on him the office or not: And this indulgence, by favour of the Prætor, was extended even to the *Sui Hæredes* of the Teſtator.

56. The Time of Deliberating was afterwards ſuperſeded by the method of making an *Inventory*, introduced by Juſtinian; by which the Heir was not bound to Creditors *ultra vires hæreditarias*. This method is followed in England with regard to Executors: and until an Inventory be made, it will be preſumed, the Teſtator hath left *aſſets* ſufficient to pay every debt.

*

57. An

57. An Executor in England, after making an Inventory, is obliged to prove the Will, either in *common form*, or *per teſtes*. The manner of proving it, and the perſons impowered to grant the *probate*; explained.

58. An Executor, after once intermeddling with the Eſtate of the Teſtator, cannot renounce his Executorſhip; but is not liable *de bonis propriis* to pay more than he has received.

59. Before Inventories were introduced, the office of an Heir was ſometimes refuſed as dangerous: And upon this foreſight SUBSTITUTIONS, or conditional Inſtitutions, were created. Theſe were 1. VULGAR. 2. PUPILLAR. 3. QUASI-PUPILLAR.

60. The VULGAR Subſtitution was the appointment of a ſecond or third Heir, in failure of the firſt.* If the firſt accepted, none of the Subſtitutes could ſucceed.

61. There might be ſeveral Subſtitutes in the place of one Inſtituted; or one Subſtitute in the place of ſeveral Inſtituted; or the perſons Subſtituted might be the ſame with thoſe who were Inſtituted.

62. In a Reciprocal Subſtitution, if the Teſtator had omitted to expreſs the parts, into which he divided the Inheritance, they were underſtood to be the ſame he had expreſſed in the Inſtitution.

63. The PUPILLAR Subſtitution was, when a Father ſubſtituted an Heir to his Children under power, diſpoſing of his own eſtate and theirs, in caſe the child refuſed to accept the inheritance, or died before the age of Puberty.† The Father and Child under pu-

* The Condition of the Vulgar Subſtitution was, *Si Inſtitutus Hæres* NON *erit:* and it was expreſſed in this Form, *Titius Hæres eſto: Si Titius Hæres* NON *erit,* TUNC *Seius Hæres eſto.*

† The Condition of the Pupillar Subſtitution was, *Si Filius Hæres* ERIT *et intra pubertatem deceſſerit:* and the Form of expreſſing that Condition was, *Filius meus Hæres eſto: Si Filius meus Hæres non erit; ſive Hæres* ERIT, *et prius moriatur quam in ſuam Tutelam venerit;* TUNC *Seius Hæres eſto.*

puberty were eſteemed but one perſon; and therefore one Will, or Teſtament, ſerved for both.

64. The Vulgar Subſtitution expreſſed contained the Pupillar; and the Pupillar Subſtitution expreſſed contained the Vulgar *.

65. No one by Subſtitution could make a Teſtament for his Child, unleſs he firſt made a Teſtament for himſelf; and if the Father's Teſtament became void, that for his Son was void alſo.

66. The QUASI-PUPILLAR Subſtitution related to thoſe Children, who were paſt Puberty, but unable, on account of ſome infirmity of mind or body, to make a Teſtament for themſelves; for whom therefore the Parent was impowered to make a Teſtament, after the *example* of the Pupillar Subſtitution.

67. Entailed Eſtates in England reſemble, in ſome reſpects, the Subſtitutions of the Roman law.

68. V. Teſtaments might be AVOIDED 1. By LAW. 2. By the OFFICE of the JUDGE. The difference between *Teſtamentum nullum*, *deſtitutum*, *ruptum*, *irritum*; explained. A Teſtament became Void by Law, when it was either *ruptum*, or *irritum*.

69. A Teſtament was *broken* 1. by the Agnation, or *quaſi*-Agnation of a *Suus Hæres*. 2. by a change of Will in the Teſtator.

70. A change of Will in the Teſtator might be declared two ways. 1. by cancelling or deſtroying a former Teſtament. 2. by making a new one of later date.

71. If

* In other words, The Vulgar Form, *Si Filius Hæres* NON *erit*, comprehended the Pupillar, *Si Filius Hæres* ERIT *et intra pubertatem deceſſerit:* And the Pupillar Form, *Si Filius Hæres* ERIT *et intra pubertatem deceſſerit*, comprehended the Vulgar, *Si Filius Hæres* NON *erit*. The latter part of the propoſition, before it became an eſtabliſhed maxim of the Civil law, was the ſubject of a memorable diſpute, in the cauſe of Curius and Coponius, between two of the greateſt lawyers of their time, Q. Scævola and L. Licinius Craſſus. It may not be without its uſe to ſubjoin the caſe

71. If the latter Teſtament, revoking the former, was not *perfect* in its kind, the former ſtill continued good. In England, Wills, which concern a Perſonal eſtate, though not finiſhed, are good as to the things already bequeathed: But a Deviſe in writing cannot be revoked, otherwiſe than by ſome other Will or Writing, ſigned by three witneſſes.

72. A Teſtament became *ineffectual*, on account of ſome change of ſtate in the Teſtator.

73. A Teſtament, good at the time of making, may become void by a change of ſtate, or alteration of circumſtances in the Teſtator, by the Engliſh laws.

74. A Teſtament, *broken* or *ineffectual* by the Civil law, was often ſupported by the Law of the Prætor.

75. A Teſtament became Void by the OFFICE of the JUDGE, by the Action called *Querela Inofficioſi Teſtamenti*. The caſes, in which this action had place, and the regulations concerning it, made by Juſtinian; explained.

76. If a Child could come at his Father's inheritance any other way, this was a bar to the *Querela*.

77. No ſuch action as the *Querela* ſubſiſts in England: what moſt reſembled it, was the Writ called *Breve de rationabili parte bonorum*, which the Wife or Children of a deceaſed Teſtator had againſt Executors, for recovery of part of the goods. But the cuſtom of reſerving a Reaſonable Part for widows and children, though ſtill in force in the city of London, has, in other places, been aboliſhed by Act of Parliament.

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caſe itſelf; as it is related by Cicero, in his treatiſe De Oratore, I. 39. *Clariſſima M. Curii cauſa M.que Coponii, nuper apud Centumviros, quo concurſu hominum, qua expectatione defenſa eſt? cum Q. Scævola*—ex ſcripto *Teſtamentorum jura defenderet, negaretque, niſi Poſthumus* et natus, et ante, quam in ſuam tutelam veniſſet, mortuus eſſet, *Hæredem* eum *eſſe poſſe, qui eſſet ſecundum Poſthumum* et *natum* et *mortuum hæres inſtitutus: Ego* voluntatem *defenderem, hac eum tum mente fuiſſe qui Teſtamentum feciſſet, ut ſi filius* non *eſſet qui in tutelam veniret, M. Curius eſſet Hæres. Num deſtitit uterque noſtrum in ea cauſa, in auctoritatibus, in exemplis, in Teſtamentorum formulis, hoc eſt, in medio Jure Civili, verſari?*

CHAP. VII.

Of LEGACIES.

Inſt. Lib. II. Tit. 20—22.
Hoppii *Comm.* Lib. II. Tit. 20—22.
Heinecc. *A. R.* } Lib. II. Tit.
——— *El. J. C.* } 20—22.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 4.
Wood's *Inſt. of Laws of England.* B. II. Ch. 6.
Burn's *Eccl. Law.* Vol. II. Title, *Wills.* art. *Payment of Legacies.*
Blackſtone's *Comm.* B. II. Ch. 18. 32.

1. A LEGACY is a bequeſt or gift of goods, left by the Teſtator, to be delivered by the Heir.

2. By the old Civil law there were four kinds of Legacies; *per Vindicationem*, *Damnationem*, *Præceptionem*, *Sinendi modo*; to each of which was aſſigned a certain form of words: but theſe diſtinctions were taken away by Juſtinian, and Legacies were all reduced to one kind.

3. In Legacies are to be conſidered I. the Things capable of being left as Legacies. II. the Perſons capable of receiving them. III. the Effects and Incidents of Legacies. IV. the Ways, by which they might be Extinguiſhed.

4. I. Things Corporeal, or Incorporeal, exiſting at preſent, or in futurity, belonging to the Teſtator, or to any other perſon, might be left as Legacies.

5. *Legatum Liberationis*, *Nominis*, *Generis*, *Optionis*, *Pœnæ nomine*; explained.

6. If a Legacy was loſt or periſhed before delivery, without the fault of the Heir, the loſs was to the Legatee; if by the fault of the Heir, he was bound to make it good.

7. II. All perſons were capable of receiving Legacies, who could either make a Teſtament, or receive from the Teſtament of another.

8. A

8. A Legacy to a Poſthumous Child was good; as alſo to an Uncertain Perſon, provided the Perſon deſigned by the Teſtator could be diſcovered.

9. An Error in the proper Name or Sirname of the Legatee, or a falſe Deſcription or Cauſe added to a Legacy, did not make it void.

10. A Legacy to a Company or Corporation was good. How far ſuch Legacies are reſtrained by the Statutes of *Mortmain*, in England, explained.

11. Certain perſons are incapable of Legacies, by the laws of England.

12. III. By the old law, no Legacies left in a Teſtament were effectual, unleſs the Teſtator had firſt appointed an Heir: But this Order was no longer neceſſary, after the times of Juſtinian.

13. In what caſes the *Jus Accreſcendi* (called, in England, the Right of Survivorſhip) had place among Co-legatees; explained.

14. A Legacy might be left purely, or conditionally; to a certain day, or from a certain day.

15. In England, if a Legatee die before the Teſtator, the Legacy is *lapſed*. In *contingent* Legacies, when the time is joined to the *ſubſtance* of the Legacy, and the Legatee dies before the day; it is a lapſed Legacy: When the time is joined to the *payment*, it is a *veſted* Legacy; and if the Legatee die before the the day, his right is tranſmitted to his Repreſentatives.

16. In what caſes, and from what time, a Legacy ſhall bear Intereſt, by the Engliſh laws.

17. A Teſtator was not permitted to exhauſt his whole patrimony in Legacies, and leave nothing for his Teſtamentary Heir. The *Leges Furia*, *Voconia*, *Falcidia*, explained.

18. By this laſt law, a Teſtator could not give away in Legacies more than three parts in four of his eſtate: the fourth part, thus ſecured to the Heir, was called the *Falcidian* portion.

19. The *Falcidian* portion was eſtimated, according to the value of the inheritance at the time of the Teſtator's

Teſtator's death, after the funeral expences and debts were paid.

20. In England, when there is a deficiency of *aſſets*, all general legacies muſt abate proportionably, in order to pay the debts of the Teſtator; and the Legatees, if paid their Legacies, are obliged to refund.

21. IV. Legacies were Extinguiſhed 1. by Ademption. 2. by Tranſlation.

CHAP. VIII.

Of FIDEI-COMMISSA, *or Bequeſts* IN TRUST.

Inſt. Lib. II. Tit. 23. 24.
Hoppii *Comm.* Lib. II. Tit. 23. 24.
Heinecc. *A. R.* Lib. II. Tit. 23—25. pr. § 1—10.
——— *El. J. C.* Lib. II. Tit. 23. 24.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 4.
Blackſtone's *Comm.* B. II. Ch. 20.

1. FIDEI-COMMISSA, or Bequeſts IN TRUST, were I. Univerſal. II. Particular.

2. I. An Univerſal *Fidei-commiſſum* was the diſpoſal of an inheritance, in whole or in part, to an Heir, *in Truſt* that he ſhould convey it, or diſpoſe of the profits of it, to another. He, to whom the inheritance was given in Truſt, was called *Hæres Fiduciarius*; he, who had a beneficial intereſt in the inheritance, was called *Hæres Fidei-commiſſarius*.

3. To prevent the Fiduciary Heir from being bound to the Creditors of the deceaſed Teſtator, it was provided by the SCTUM TREBELLIANUM, that all

all the Actions, which by the Civil law might be brought by or againſt the Fiduciary Heir, ſhould be transferred to the *Fide-committee.*

4. But as Bequeſts in Truſt were ſtill liable to be defeated, by the Fiduciary Heir refuſing to accept, the SCTUM PEGASIANUM was made; by which, after the example of the *Falcidian* law with regard to Legacies, the Fiduciary Heir was permitted to retain a fourth part of the Inheritance, if inſtituted Univerſal Heir; or a fourth of his Portion, if inſtituted Heir for a Part.

5. Theſe two *Scta* were afterwards reduced into one, by Juſtinian.

6. A Bequeſt *in Truſt* might be left by Codicil or by Teſtament.

7. II. A Particular *Fidei-commiſſum* was the diſpoſal of one particular thing to an Heir, *in truſt* that he ſhould deliver it to another.

8. Such a Particular *Fidei-commiſſum* differed little from a Legacy.

9. Eſtates veſted in Truſtees for the benefit of a third party; and what are called USES and TRUSTS in the laws of England; are, in many reſpects, ſimilar to the Fiduciary Settlements of the Roman law.

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CHAP. IX.

Of SUCCESSION *by* LAW.

Wood's *Inſt. of Civ. Law.* B.II. Ch. 4.

Burn's *Eccl. Law.* Vol. II. Title, *Wills.* art. *Adminiſtration.*
Blackſtone's *Comm.* B. II. Ch. 1. 14. 32.

1. IN caſes, where a perſon hath neglected, or was not permitted, to diſpoſe of his Property, after his deceaſe, by Teſtament; the LAW of each particular Society appoints a Succeſſor, whom it judges to have the beſt right to enter on the vacant poſſeſſion.

2. SUCCESSION by LAW is the Title, by which a man, on the death of his Anceſtor, dying INTESTATE, acquires his eſtate, whether Real or Perſonal, by the right of Repreſentation, as his next Heir.

3. An INTESTATE is one, who dies without a Will; or who leaves a Will, which is not valid.

4. In England, Succeſſion by Law to an eſtate in LANDS is called DESCENT; the Perſon ſucceeding is called the HEIR; and the Eſtate itſelf is called the INHERITANCE. In Succeſſion by Law to an eſtate in GOODS, the Perſons, in whom they were formerly veſted, were the Biſhops, by indulgence of the King: but Biſhops are now compelled to commit their power to certain perſons called ADMINISTRATORS, expreſsly provided by Law.

5. Succeſſion by Law is of two ſorts. 1. *in capita*, when the Inheritance is divided *viritim*, according to the number of perſons; all claiming in *their own* right, as being in equal degree of kindred. 2. *in ſtirpes*, when the Inheritance is divided *gregatim*; the claimants being ſuppoſed to come, by right of *Repre-*

ſentation,

ſentation, into the place of the perſon deceaſed, and dividing that ſhare in common, which he, whom they repreſent, would have had, had he been living.

6. The Roman law, concerning Inteſtate Succeſſion, which is contained in the INSTITUTIONS, was entirely defeated by the NOVELS.

I.

Of SUCCESSION *by* LAW, *according to the* INSTITUTIONS.

Inſt. Lib. III. Tit. 1—6.
Heinecc. *A. R.* } Lib. III.
——— *El. J. C.* } Tit 1—6.
Eſprit des Loix. Liv. XXVII.
Blackſtone's *Comm.* B. II. Ch. 14. 15.

7. The old Roman law concerning Succeſſions is to be explained from the law concerning the diviſion of Lands; which required that the Property of one Family ſhould not paſs into another.

8. The old Roman law acknowledged only two Orders in the Succeſſion to an Inteſtate eſtate. I. the SUI. II. the AGNATI. To theſe was added, by the Prætor, a third. III. the Order of COGNATI.

9. I. The SUI were ſuch Children as were 1. in the Family, and under the Power, of their Father. 2. in the firſt Degree.

10. Children born in Concubinage, when Legitimated, were reckoned *Sui Hæredes*.

11. Emancipated Children, though excluded from the *Suitas* by the Civil law, were reſtored to it by the law of the Prætor.

12. Adopted children, by a Conſtitution of Juſtinian, belonged to the family, and were under the power, of their Natural Father; and were only ſo far of the family of their Adoptive Father, as to ſucceed to his goods with his other Children, if he died Inteſtate.

13. It was indifferent, whether the *Suus Hæres* were male or female: Sons and daughters ſucceeded in their

their own right, *in capita*; Grandchildren from a *Son*, though in ever ſo remote a degree, ſucceeded, by right of Repreſentation, *in ſtirpes*.

14. Grandchildren from a *Daughter* were not *Sui Hæredes:* but the conſtitutions of the Emperors gave them the rights of the *Suitas*, and put them, nearly, on the ſame foot with Grandchildren from a Son.

15. II. In default of a *Suus Hæres*, the law of the 12 Tables paſſed to the Collateral line, and called in the AGNATI.

16. *Agnati* were thoſe relations, male and female, which came from the ſame Father, though from different mothers.

17. The Decemviral law, in calling the *Agnati* to an Inteſtate inheritance, made no diſtinction of SEX: the *Media Juriſprudentia* excluded Women, beyond ſuch Siſters as were *Conſanguineæ:* Juſtinian permitted all the *Agnati*, whether male or female, to inherit, according to the prerogative of Degree; and made the *Soror Uterina* equal to the *Soror Germana*.

18. The rights of Agnation were given by Juſtinian to Siſters Children, if the Inteſtate left no brother or ſiſter living; but did not extend to Siſters Grandchildren.

19. If the firſt degree failed, by death or renunciation, the inheritance was not tranſmiſſible to the next, till the times of Juſtinian.

20. In the Collateral line, the right of *Repreſentation* did not take place; but the neareſt degree, whether one or more, excluded all the remoter; and the Succeſſion was always *in capita*.

21. Agnatic Succeſſion has place in DESCENTS, by the laws of England; which, in Collateral Inheritances, always prefer the Male ſtocks before the Female, unleſs where Lands have actually deſcended from a Female.

22. The law of the 12 Tables did not allow Inheritances to *Aſcend*. A Father could ſucceed to his Son, whom he had Emancipated: But this ſucceſſion

was founded on the ancient Ceremony of Emancipation; by which the Parent was conſidered as a *quaſi-Patronus*, and the Child as his *quaſi-Libertus*.*

23. A Mother and her Child could not ſucceed each other by the Decemviral law. The SCTUM TERTULLIANUM permitted a MOTHER, that had a certain number of Children, to ſucceed to a Son or a Daughter, who had left no Children of their own; but did not allow her to ſucceed to a Grandſon or a Grandaughter.

24. If the inteſtate Child left a Father *and* a Mother, the Father was preferred: If a Father and Mother, together with a Grandfather, the Grandfather was preferred to the other two: If a Mother and Grandfather only, the Grandfather was excluded.

25. Brothers and Siſters by the whole blood, and Brothers by the ſame Father, excluded the Mother; Siſters by the ſame Father were admitted with the Mother: If there were both Brothers and Siſters, the inheritance was equally divided between them, and the Mother was excluded.

26. The regulations in the *Sctum Tertullianum*, made by Juſtinian, explained.

27. The SCTUM ORFICIANUM called a CHILD, whether Son or Daughter, to the inheritance of the Mother; as the *Sctum Tertullianum* had called the Mother to the inheritance of her Child: and this privilege was extended, by the Conſtitutions, to Grandchildren, with regard to their Grandmother.

28. Natural Children, and Spurious, were equally favoured, by the *Sctum Orficianum*, with thoſe that were Legitimate.

29. The Iſſue of Baſtards is ſometimes favoured, as to Real Eſtates, by the laws of England.

30. III. When both the Orders of *Sui* and *Agnati* failed, whether reckoned by the laws of the 12 Tables, or of the Senate, or by the Conſtitutions; the Prætor introduced his third Order of COGNATI.

31. *Cognati*

* See Book I. Ch. 9. pr. 13.

31. *Cognati* were thoſe relations, male and female, which came by the Mother.

32. The Rights of Cognation were given, by the Prætorian law, 1. to ſuch as had once the right of Agnation, but loſt it by a change of Family. 2. to ſuch as never had that right, being deſcended from the Mother. 3. to Spurious children.

II.

Of SUCCESSION *by* LAW, *according to the* NOVELS.

Novell. CXVIII. Cap. 1. 2. 3.
——— CXXVII. Cap. 1.
Inſtitutions of Juſtinian by Dr. Harris: with Nov. CXVIII. Cap. 1. 2. 3. at the end.
Hoppii *Comm.* Lib. III. *Tabulæ de Succeſſione ab Inteſtato.*
Heinecc. *El. J. C.* Lib. III. *De Succeſſione ab Inteſtato, ſecundum Nov.* CXVIII.
Wood's *Inſt. of Civ. Law.* B. II. Ch. 4.
Taylor's *El. of Civ. Law.* art. *Property.* p. 537—544.
Wood's *Inſt. of Laws of England.* B. II. Ch. 3. 6.
Burn's *Eccl. Law.* Vol. II. Title, *Wills.* art. *Diſtribution.*
Blackſtone's *Comm.* B. II. Ch. 8. 14. 15. 32.

33. In Succeſſion by Law, as ſettled by Juſtinian in the Novels, the diſtinctions between the *Sui* and *Emancipati*, and between the *Agnati* and *Cognati*, were aboliſhed.

34. The Orders of Succeſſion, according to the Novels, were three. I. DESCENDANTS. II. ASCENDANTS. III. COLLATERALS.

35. The Courts in England, which have cognizance of the Diſtribution of Inteſtates effects, in caſes where our laws are ſilent, or not ſufficiently expreſs, are chiefly guided by the doctrine of the Novels.

36. I. DESCENDANTS, of whatever degree, male or female, excluded all other relations, whether Aſcendants or Collaterals.

37. By the law of England, INHERITANCES lineally DESCEND, to the Iſſue of the perſon laſt ſeized, *in infinitum.* In the Diſtribution of GOODS, the Statute law gives the ſame preference with the Civil law to Deſcendants, excluſive of Aſcendants and Collaterals; only taking in the Wife of the deceaſed, where there is one ſurviving.

38. Sons and Daughters, that is, the immediate Deſcendants of the deceaſed, ſucceeded *in capita:* in failure of them, Deſcendants of a more remote degree ſucceeded, by Repreſentation, *in ſtirpes*; whether they were alone, or had Uncles to concur with them.

39. In Succeſſion to LANDS, in England, the lineal Deſcendants, *in infinitum*, of a perſon deceaſed, repreſent their Anceſtor. In Succeſſion to GOODS, where all the claimants in the Right line are in *equal* degree, the diviſion of the Eſtate is *in capita*; and *Repreſentation* is only then introduced, when neceſſary to prevent excluſion.

40. A child in the Mother's womb was reckoned among the Deſcendants of the deceaſed, by the Civil law. In England, Diſtribution is not made till within one year from the death of the Inteſtate; within which time, all Poſthumous children will be born.

41. In the order of Deſcendants, no regard was had to Primogeniture; and no preference in reſpect to Sex.

42. In England, with regard to LANDS, the Male iſſue is admitted before the Female: where there are two or more Males in equal degree, the Eldeſt only inherits; but the Females all together.

43. In the Diſtribution of GOODS of an Inteſtate in England, one third goes to the Widow, and the remainder, in equal portions, to his Children, or to their Repreſentatives: if no Widow, all is diſtributed among the Children: if no Children or Repreſentatives, a moiety goes to the Widow, and the other moiety to the *next of Kin*, in equal degree, and their Repreſentatives.

44. The degrees of Conſanguinity, by which the

next

next of Kin are inveſtigated, are reckoned, in the Diſtribution of Goods in England, according to the computation of the Civil law: In Deſcents, the degrees of Conſanguinity are reckoned according to the computation of the Canon law.

45. II. When an Inteſtate left no Deſcendants, and no Collaterals; ſuch ASCENDANTS as were neareſt in degree, male or female, paternal or maternal, ſucceeded to his eſtate, to the excluſion of all the remoter; for, among Aſcendants, Repreſentation was not admitted.

46. When ſeveral Aſcendants concurred in the ſame degree, thoſe on the part of the Father received a moiety, and thoſe on the part of the Mother had the other moiety; without regard to the number of perſons on either ſide.

47. If beſides a Father or Mother, who are Aſcendants neareſt in degree, there were alſo Collaterals, as Brothers and Siſters of the Whole blood, all ſucceeded in equal portions, *in capita:* But brothers and ſiſters Children, if of the Whole blood, ſucceeded, by Repreſentation only, *in ſtirpes* *. Brothers or Siſters of the Half blood, and brothers or ſiſters Grandchildren, were totally excluded.

48. If there was no Father nor Mother, but a Grandfather and a Brother or Siſter of the Whole blood, ſuch Brother or Siſter excluded the Grandfather: And this ſeems now to be the ſettled practice, with regard to Diſtributions in England †. 49. In

* It may be proper here to remark, that this attention to brothers and ſiſters Children was not in conſequence of Nov. 118. cap. 2. but of one yet later, *viz* Nov. 127. cap. 1.

† The words of Nov. 118. c. 2. are, *Si verò cum Aſcendentibus inveniantur Fratres aut Sorores ex Utriſque Parentibus conjuncti defuncto, cum* PROXIMIS *gradu Aſcendentibus vocabuntur,* SI *et* PATER *aut* MATER *fuerint.* And the generality of Commentators have underſtood this paſſage as admitting Aſcendants, whether the *next in degree* or not, and Brothers, to take *jointly.* But *Voet* ſupports the contrary opinion with the utmoſt clearneſs; and the Lord Chancellor HARDWICKE, in a learned argument, as his manner was, on the caſe of *Evelyn* and *Evelyn,* adopted *Voet*'s interpretation, and declared in favour of the Brother, to the *excluſion* of the Grandfather. See *Voet* comment. ad Pandectas, Vol. II. Lib. 38. Tit. 17. § 13. and Burn's Eccleſiaſtical Law, Vol. II. p. 722. Ed. 1763.

49. In Succeſſion to LANDS in England, Inheritances never ASCEND: but lands, which came by the Father, *deſcend* to the Heirs on the part of the Father; and lands, which came by the Mother, to the Heirs on the part of the Mother.

50. In the diſtribution of GOODS in England, when a Child dies inteſtate, leaving a Father, but no children of his own; the Father is entitled to the whole: if he leaves no Father, but a Mother, together with Brothers or Siſters, or their Repreſentatives, every Brother and Siſter, and their Repreſentatives, have an equal ſhare with her: Grandfathers and Grandmothers are admitted, in excluſion of Uncles and Aunts: Aſcendants, equal in degree, ſucceed to equal ſhares.

51. III. In the Order of COLLATERALS, when no one was left in the Deſcending or Aſcending lines, there might be 1. Brothers and Siſters alone. 2. Brothers and Siſters, together with brothers and ſiſters Children. 3. Brothers and Siſters Children alone.

52. Brothers and Siſters alone, of the Whole blood, ſucceeded *in capita*, to the excluſion of the half blood: Brothers and ſiſters Children, concurring with brothers and ſiſters, ſucceeded, by Repreſentation, *in ſtirpes*: Brothers and ſiſters Children, alone, ſucceeded *in capita*.

53. No Repreſentatives were admitted among Collaterals, after brothers and ſiſters Children.

54. In default of the Whole blood, the Half ſucceeded.

55. If there were neither Brothers nor Siſters, nor their Children; other Collaterals were called in, according to the prerogative of Degree: and if ſeveral were found in the ſame degree, all ſucceeded *in capita*.

56. In DESCENTS in England, the Whole blood is preferred, and the Half blood is entirely excluded: which may ſometimes debar a Son from an Inheritance, deſcended from his own Father.

57. In the Diſtribution of GOODS in England, Bro-

Brothers and Siſters, whether of the whole or half blood, being in *equal* degree to the Inteſtate, are entitled to equal ſhares of his eſtate: Brothers and ſiſters Children, concurring with brothers and ſiſters, ſucceed *in ſtirpes:* Brothers and ſiſters Children, alone, ſucceed *in capita:* And no Repreſentation is admitted, beyond brothers and ſiſters Children.

58. By the law of the Code,* if no one was left in the Deſcending, Aſcending, or Collateral lines, the Huſband ſucceeded to the eſtate of the Wife, and the Wife to the eſtate of the Huſband. But this was altered, by the law of the Novels.†

59. In England, proviſion is made for WIDOWS, by *Dower* or *Jointure*; and a HUSBAND, who has married a woman ſeized of an Eſtate of Inheritance, and has iſſue by her, born alive, is, on the death of his wife, Tenant for life *by the Curteſy.*

60. Laſtly, in default of a LEGAL HEIR, the eſtate became a *res caduca*, and the FISCUS, or Exchequer, ſucceeded. In England alſo, upon deficiency of Inheritable Blood, Lands ESCHEAT to the King, or to the Lord of whom they are holden.

CHAP. X.

Of the Succeſſion of the LIBERTI.

Inſt. Lib. III. Tit. 7. 8. 9.
Heinecc. *A. R.* } Lib. III.
——— *El. J. C.* } Tit. 7. 8. 9.

1. BY the old law, Slaves, even after Manumiſſion, had no right to Inherit from each other. The Emperor Valentinian permitted the Children and Grandchildren of a LIBERTUS to ſucceed to him, dying Inteſtate; and this privilege was extended by Juſtinian

* C. 6. 18. 1. † Nov. 53. c. 6.

Juſtinian to *all* his Deſcendants, in excluſion of the right of the PATRON.

2. By the Decemviral law, a Libertus might ſecurely paſs his Patron by, in his laſt Will; and, in caſe of Inteſtacy, the Patron then only ſucceeded, if the Libertus left no ſuch children as had the *jus Suitatis*.

3. The law of the Prætor reſtrained the Libertus from paſſing his Patron by, in his laſt Will; and gave the Patron *poſſeſſion of the Goods*, as far as a Moiety, if the Libertus, having no *ſuus hæres* of his own, had left him leſs than that ſum.

4. The *Lex Papia Poppæa* afterwards enacted, that, whether the Libertus died Teſtate or Inteſtate, provided he were of the richer ſort, and left leſs than three children, the Patron ſhould be admitted to a *pars virilis*.

5. The regulations in the Prætorian law, and in the *Lex Papia Poppæa*, made by Juſtinian; explained.

6. The Patron being dead, his CHILDREN, in the neareſt degree, ſucceeded to the Goods of the Libertus: Unleſs the Patron, by his laſt Will, or otherwiſe, had *aſſigned* the Libertus to any one Child, in preference to the reſt; in which caſe ſuch Child alone had the *jus Patronatus*, and the other children were excluded.

CHAP.

CHAP. XI.

Of SUCCESSION *by the* BONORUM POSSESSIO *granted by the Prætor.*

Inſt. Lib. III. Tit. 10.
Hoppii *Comm.* Lib III. Tit. 10.
Heinecc. *A. R.* } Lib. III.
——— *El. J. C.* } Tit. 10.

1. BONORUM POSSESSIO is the Right of purſuing and retaining the Inheritance of a perſon deceaſed, not ſtrictly due by the Civil law, but granted by the Prætor, from a principle of Equity.

2. The *Bonorum Poſſeſſio*, granted by the Prætor, was 1. EDICTAL, or Ordinary; when the cauſe was not heard judicially. 2. DECRETAL, or Extraordinary; when the cauſe was heard judicially.

3. The EDICTAL or Ordinary grant took place, 1. when there was a Teſtament. 2. when there was not a Teſtament.

4. The Ordinary grant, when there *was* a Teſtament, was 1. *contra tabulas*, in favour of children paſſed by in the Teſtament, without juſt cauſe. 2. *ſecundum tabulas*, to ſupport a Teſtament defective in form.

5. The Ordinary grant, when there was *not* a Teſtament, was reduced by Juſtinian to four kinds. 1. *Unde Liberi*, in favour of Emancipated Children. 2. *Unde Legitimi*, in favour of the *Agnati*. 3. *Unde Cognati*, given to relations on the part of the Mother. 4. *Unde Vir & Uxor*, by which the Huſband and Wife ſucceeded each other, when the *Cognati* failed.

6. The DECRETAL or Extraordinary Grant was given to particular perſons, by a ſpecial Law or Conſtitution.

7. The *Bonorum Poſſeſſio* could not be claimed, after a limited time.

8. The

8. The Adminiſtration of the Goods of an Inteſtate, granted by the Ordinary to his next of Kin, in England, is not unlike the Poſſeſſion of Goods, granted by the Roman Prætor.

CHAP. XII.

Of the Acquiſition of Property by ARROGATION; *and other* CIVIL *Modes of acquiring, mentioned in the Inſtitutions.*

Inſt. Lib. III. Tit. 11. 12. 13.
Heinecc. *A. R.* Lib. III. Tit. 11. 12. 13. Tit. 30. § 2—8.
——— *El. J. C.* Lib. III. Tit. 11. 12. 13.
Blackſtone's *Comm.* B. II. Ch. 18. 31.

1. BESIDES the Civil Modes of acquiring Property already explained, Preſcription, Donation, Succeſſion; there are four others, mentioned in the Inſtitutions. I. ARROGATIO. II. BONORUM ADDICTIO, LIBERTATUM SERVANDARUM CAUSA. III. SECTIO BONORUM. IV. EX SCTO CLAUDIANO.

2. I. He who paſſed into another family by that ſpecies of Adoption, called Arrogation, transferred himſelf, and all his rights, except ſuch as periſhed by the change of family, to the Arrogator. This was the Acquiſition of Property by ARROGATION.

3. II. If a Teſtator in his laſt Will had given Freedom to Slaves, and the Teſtament afterwards became *deſtitute*; the Slaves loſt their Freedom. To prevent this, the Effects of the deceaſed were by the Prætor *addicted*, or made over, to one or more of the manumitted Slaves, or to any other perſon, who was admitted as Teſtamentary Heir, giving caution to pay the Creditors; and by this means the Slaves obtained their

their Freedom. This Mode of acquiring Property was called BONORUM ADDICTIO, LIBERTATUM SERVANDARUM CAUSA.

4. III. The Effects of Debtors, in case of Insolvency, were assigned by the Prætor to a certain Person, in order to be *sold* and divided among the several Creditors. This was the Mode of acquiring Property *per* SECTIONEM BONORUM.

5. The History of the Roman Law, with regard to Debtors; and the Decemviral Law, which consigned the Debtor into the hands of his Creditors, with liberty to *cut the body* into pieces for their respective Debts; explained.

6. The assignment of the Effects of Debtors, as practised by the old Civil law, gave place to the law of *Cession*, introduced by the Christian Emperors; by which Debtors were obliged to surrender all their Goods to their Creditors upon Oath.

7. The laws of Bankruptcy in England resemble the law of Cession among the Romans.

8. IV. The Mode of acquiring Property EX SCTO CLAUDIANO * was abolished by Justinian.

* See the History of this *Senatûs-consultum* in Tacit. Annal. L. 12. c. 53.

CHAP.

CHAP. XIII.

Of OBLIGATIONS *in general.*

Inſt. Lib. III. Tit. 14.
Hoppii *Comm.* Lib. III. Tit. 14.
Heinecc, *A. R.* } Lib. III.
———*El. J. C.* } Tit. 14.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 1.

1. PROPERTY in Action, when conſidered with regard to the perſon *from* whom it is due, is called OBLIGATION; when conſidered with regard to the perſon *to* whom it is due, it is called *Jus ad Rem.*

2. Obligation is a Bond of Law or Equity, and ſometimes of both, by which a perſon is laid under a neceſſity to Give or to Do ſomething.

3. Obligations were 1. Natural: which were (1) Perfect. (2) Imperfect. 2. Civil. 3. Mixt. Mixt Obligations were 1. Civil. 2. Prætorian.

4. Obligations might ariſe from a lawful or unlawful act: The former ſort were called CONTRACTUS; the latter DELICTA.

5. When the agreement in a Contract was not expreſſed, but preſumed, it was called *Quaſi-Contractus.* When an unlawful act was committed through negligence, and not ill deſign, it was called *Quaſi-Delictum.*

6. From hence Obligations were diſtributed into four ſpecies. I. EX CONTRACTU. II. QUASI EX CONTRACTU. III. EX DELICTO. IV. QUASI EX DELICTO.

CHAP.

CHAP. XIV.

Of Obligations EX CONTRACTU, *or from Contracts properly ſo called.*

Hoppii *Comm.* Lib. III. Tit. 14. Heinecc. *A. R.* } Lib. III. ——— *El. J. C.* } Tit. 14. Wood's *Inſt. of Civ. Law.* B. III. Ch. 1. Blackſtone's *Comm.* B. II. Ch. 25. 30.

1. A CONTRACT, properly ſo called, is an agreement, upon ſufficient Conſideration, to do, or not to do, a particular thing; with an Obligation, at leaſt on one ſide, and an Action to enforce the performance.

2. PACTS and Contracts were different from each other. *Pacta* were 1. *Nuda.* 2. *Legitima.* 3. *Adjecta.*

3. Property in Action may be transferred, in England, by a Contract: but no Contract is binding, by the Engliſh laws, unleſs attended with a Conſideration: which is 1. a Good. 2. a Valuable conſideration.

4. Contracts were, ſome of them, *Bonæ Fidei*; others *Stricti Juris.* In the former, Equity and Good Faith were more conſidered than the bare words of the convention: in the latter, nothing could be demanded, but what had been expreſsly covenanted by the contracting parties.

5. In eſtimating the Damage occaſioned by either of the parties acceding to a Contract, it was conſidered whether ſuch Damage were owing to a *Dolus*, a *Caſus Fortuitus*, or a *Culpa.* *Culpa* was of three ſorts; *Lata*, *Levis*, *Leviſſima.*

6. In Contracts of Partial Benefit, where the advantage was on the ſide of the Giver, the Receiver was anſwerable for a *Dolus* and *Culpa Lata* only: where

where the advantage was on the ſide of the Receiver, ſuch Receiver was anſwerable even for the *Culpa Leviſſima*. In Contracts of Mutual Benefit, the parties, beſides a *Dolus* and *Culpa Lata*, were anſwerable for the *Culpa Levis*, but not the *Leviſſima*.

7. Contracts were I. INNOMINATE, II. NOMINATE.

8. INNOMINATE Contracts were uſually ranged under four claſſes, expreſſive of the Conſideration on which they were founded. 1. *Do ut des.* 2. *Do ut facias.* 3. *Facio ut des.* 4. *Facio ut facias.*

9. NOMINATE Contracts were of four kinds, expreſſive of the Ways in which they were formed. I. REAL. II. VERBAL. III. LITERAL. IV. CONSENSUAL.

CHAP. XV.

Of REAL *Contracts.*

Inſt. Lib. III. Tit. 15.
Hoppii *Comm.* Lib. III. Tit. 15.
Heinecc. *A. R.* } Lib. III. Tit.
——— *El. J. C.* } 15.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 2.
Eſprit des Loix. Liv. XXII. Ch. 19—22.
Grotius *de J. B. et P.* Lib. II. Cap. XII. § 20. 21.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 13.
Blackſtone's *Comm.* B. II. Ch. 10. 30.

1. REAL Contracts were thoſe, in which, beſides the conſent of the parties, the delivery of ſome Thing was required, to perfect the Obligation. Theſe were four in number. I. MUTUUM. II. COMMODATUM. III. DEPOSITUM. IV. PIGNUS.

2. I. MUTUUM is a loan of conſumable Goods, called *Res Fungibiles*, lent on condition of a return in Kind.

3. In

3. In a Loan of Money, it might happen that the value altered, after the Contract: Whether, in ſuch a caſe, the payment ſhould be made according to the price the money bore at the time of the Contract, or at the time of Payment; conſidered.

4. A *Mutuum* allowed of no recompence, by way of Intereſt. When a Loan of conſumable Goods carried Intereſt with it, it was called FOENUS.

5. The regulations of the Roman law concerning Intereſt for Money; and the method of computing it; explained.

6. The higheſt rate of Intereſt for common Loans, permitted by the Roman law, before the age of Juſtinian, was *Twelve per Cent:* this was called *Uſuræ Aſſes*, and *Uſura Centeſima*, or *Legitima*. Juſtinian reduced it to a *Triens*, or *Four per Cent.*

7. The Regulations of the law of England concerning Intereſt.

8. The taking of Intereſt for Money is not unlawful.

9. II. COMMODATUM is a Loan of inconſumable Goods, lent gratuitouſly, for a certain Uſe, on condition of having the ſame returned in *ſpecie.*

10. III. DEPOSITUM is the delivery of a Thing in Truſt to another, on condition of reſtoring it to the owner on demand. Such a Contract, in the law of England, is called ſimple BAILMENT.

11. *Depoſitum* was of two kinds. 1. *Simplex.* 2. *Miſerabile.*

12. The Nature of a SEQUESTRUM, and in what reſpects it differed from a *Depoſitum*; explained.

13. IV. PIGNUS is the delivery of a Thing to a Creditor, as a Security for Money lent, on condition of returning it to the owner, after payment of the debt.

14. When the thing pledged was not delivered to the Creditor, but continued in poſſeſſion of the Debtor, the Contract was called HYPOTHECA.

15. In England, a moveable Chattel, delivered as Security for Money lent, is called a PAWN. Eſtates

in Land, granted for the like purpoſe, are called Eſtates *in Vadio*, or in GAGE; being 1. *In vivo Vadio*, or LIVING GAGE. 2. *In mortuo Vadio*, or MORT GAGE.

16. Pledges, by the Civil law, were 1. Expreſs. 2. Tacit. They were alſo 1. General, of a man's whole eſtate. 2. Particular, of ſome one thing only.

17. Sometimes the Creditor had the profits of the Pledge, by way of Intereſt: this was called *Pactum Antichreſeos*.

18. In caſe of delay of payment, the Creditor had power to ſell the Pledge; allowing the Debtor two years, after notice given, to redeem it. *

19. In a Mortgage in England, if the money be not paid at the day aſſigned, the Property of the Land becomes abſolutely veſted in the Mortgagee, by the Common law; but may be reclaimed by the right owner, by what is called the *Equity of Redemption:* And the ſame indulgence is allowed in a Pawn of Goods.

20. V. Beſides the four Real Contracts now mentioned; there is a fifth, not treated of in the Inſtitutions, called PRECARIUM: when one grants the Uſe of ſome Thing to another, at his Requeſt, till ſuch time as the grantor ſhall recall it.

* Inſt. II. Tit. 8. § 1.

CHAP.

CHAP. XVI.

Of VERBAL *Contracts.*

Inſt. Lib. III. Tit. 16—21.
Hoppii *Comm.* Lib. III. Tit. 16—21.
Heinecc. *A. R.* Lib. III. Tit. 16—20. Tit. 21.
——— *El. J. C.* Lib. III. Tit. 16—21.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 3.
Wood's *Inſt. of Laws of England.* B. II. Ch. 3.
Blackſtone's *Comm.* B. II. Ch. 20.

1. VERBAL Contracts were thoſe, in which, beſides the conſent of the parties, a ſolemn form of Words was required, to perfect the Obligation. Theſe were chiefly two. I. STIPULATION. II. FIDEJUSSION.

2. I. STIPULATION is a Contract, by which a perſon is bound to Give or to Do ſomething, in conſequence of a Queſtion aſked, and a fit Anſwer preſently made to it.

3. Both the Parties in a Contract of Stipulation were denominated *Rei:* the perſon that aſked the Queſtion, was called *Reus Stipulandi vel Credendi*; he that returned the Anſwer, *Reus Promittendi vel Debendi.* When more Stipulators or Promiſers than one were concerned, they were called *Correi Stipulandi*, or *Correi Promittendi.*

4. The promiſe in a Stipulation might relate to ſomething Certain or Uncertain. The Stipulation itſelf might be 1. Pure. 2. Conditional. 3. Performable on a certain Day. 4. or at a certain Place.

5. Whatever was acquired by Stipulation, the Stipulator acquired for himſelf only, and not for any other: Except he were 1. a Son under power. 2. a Slave.

6. Effects of Stipulation by a Slave, in the caſes of a *Servus publicus*, *communis*, *hæreditarius*.

7. Stipulations, in reſpect of their Cauſes, were 1. Voluntary, by conſent of parties; otherwiſe called CONVENTIONAL. 2. NECESSARY, by Order from a Magiſtrate. Neceſſary Stipulations were 1. Judicial. 2. Prætorian. 3. Common.

8. Stipulations became INEFFECTUAL 1. by Incapacity in the Perſons contracting. 2. Incapacity in the Things, which were the Subject of the Contract. 3. Defect in the Form.

9. Stipulations, in England, differ nothing from common Covenants, whether Nude, or on ſufficient Conſideration: and by the Stipulator is generally meant the Promiſer, not he to whom the promiſe is made, as in the Roman law.

10. II. FIDEJUSSION is a Contract, in which a perſon bound himſelf, as a Surety or Acceſſory, for another, by the way of Stipulation, without diſcharging the obligation of the Principal.

11. Fidejuſſors, or Sureties, were allowed in Contracts of every kind; and they might accede to natural as well as civil Obligations: But no Surety could be bound for a greater ſum than was owing from the Principal.

12. If there were more Sureties than one, the Creditor might ſue which of them he pleaſed for the whole, without convening the principal Debtor.

13. To relieve Sureties in ſuch circumſtances, the law allowed them three advantages. 1. *Beneficium Diviſionis.* 2. *Ordinis ſive Excuſſionis.* 3. *Cedendarum Actionum.*

14. All Perſons might be Sureties for others, unleſs ſpecially forbidden, who could ſtipulate for themſelves. Women were expreſsly prohibited by the *Sctum Velleianum.*

15. By the laws of England, two or more Perſons may bind themſelves in an Obligation, jointly, or jointly and ſeverally: in the former caſe, the Obligee

muſt

muſt ſue them jointly; in the latter, he may ſue them jointly, or any one of them at his election: And one Surety may compel another towards payment of the Debt, for which they were jointly bound.

CHAP. XVII.

Of LITERAL *Contracts.*

Inſt. Lib. III. Tit. 22.
Hoppii *Comm.* Lib. III. Tit. 22.
Vinnii *Comm. in Inſtitutiones.* Lib. III. Tit. 22.
——— *Selectæ Juris Quæſtiones.* Lib. I. Cap. 41.
Heinecc. *A. R.* } Lib. III. Tit.
——— *El. J. C.* } 22.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 4.
Blackſtone's *Comm.* B. II. Ch. 30.

1. LITERAL Contracts were thoſe, in which, beſides the conſent of the parties, a Note in Writing was required, to perfect the Obligation.

2. Such Contracts, in the old Roman law, were nothing more than a Species of *Novation*;* by which the Obligation of a former Debt was deſtroyed, and a new one by Writing ſubſtituted in its room.

3. A Literal Contract, in the later laws of the Romans, was that, by which a perſon, who had confeſſed in Writing he had received Money from another, and had not retracted ſuch confeſſion within two years, became bound for the Money, though it had never been paid.

4. If the Creditor brought his Action before the end of two years, the Debtor could elude the force of it by what was called *Exceptio non numeratæ pecuniæ:* and in this caſe, the proof of payment lay upon the Creditor.

5. Whe-

* See Ch. XX. of this Book, pr. 8.

5. Whether, after the end of two years, the Debtor could uſe his privilege of an Exception, on condition he took the proof of non-payment on himſelf; conſidered.

6. A Contract of Debt in England is 1. a Debt of Record. 2. by Specialty. 3. by Simple Contract. But no Exception, that the Money was never paid, is allowed to Debtors, who have acknowledged their Debts in Writing, as was permitted by the Civil law.

CHAP. XVIII.

Of CONSENSUAL *Contracts.*

Inſt. Lib. III. Tit. 23—27.
Hoppii *Comm.* Lib. III. Tit. 23—27.
Heinecc. *A. R.* } Lib. III. Tit.
——— *El. J. C.* } 23—27.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 5.
Taylor's *El. of Civ. Law:* art. *Property.* p. 479—496.
Grotius *de J. B. & P.* Lib. II. Cap. XII. § 3. 7—19. 24.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 13.
Wood's *Inſt of Laws of England.* B. II. Ch. 1.
Blackſtone's *Comm.* B. II. Ch. 3. 6. 9. 12. 30.

1. CONSENSUAL Contracts were thoſe, in which the Conſent alone of the Parties perfected the Obligation. Theſe were five in number. I. EMPTIO VENDITIO. II. LOCATIO CONDUCTIO. III. EMPHYTEUSIS. IV. SOCIETAS. V. MANDATUM.

2. I. EMPTIO VENDITIO, or Buying and Selling, is a Contract, by which Goods are delivered from one man to another, for a certain Price.

3. The Price of Things is their comparative value. The inconveniences of adjuſting ſuch value by the method of Permutation or Exchange occaſioned the introduction of a common Standard, called Money.

4. An

4. An implied Warranty was annexed to every Sale, in reſpect to the Title of the Seller. Goods, ſold without the owner's conſent, were ſometimes taken from the Buyer, and redelivered to the Proprietor, by the ſentence of the Judge: Such a Judicial Recovery of what another had acquired by a legal Title was called EVICTION.

5. In England, no Contract for the ſale of Goods, worth ten pounds or upwards, is valid; except the Buyer receives part of the Goods, or gives ſomething to the Seller by way of Earneſt, or unleſs ſome Note of the bargain in Writing be ſigned by the Parties, or their Agents.

6. *Addictio in Diem, Pactum Commiſſorium, Jus Retractus ſive retrovendendi*; explained.

7. II. LOCATIO CONDUCTIO, or Letting and Hiring, is a Contract, by which the Uſe of a Thing, or the Labour of a Perſon, is granted by one man to another, for a certain time, in conſideration of a certain Rent.

8. If the Hirer died before the Expiration of his Term, the remaining part was enjoyed by his Heir.

9. III. EMPHYTEUSIS is a Contract, by which Lands or Houſes are given in Perpetuity, or for a long Term, on condition that the Tenant ſhall improve the Lands, and pay a yearly Canon or Quit-Rent to the Proprietor.

10. The Emphyteutic Contract was 1. Civil. 2. Eccleſiaſtical.

11. Fee-Farm Rents, and Copyhold Eſtates in England, are ſimilar to the Emphyteutic Contract of the Roman law.

12. IV. SOCIETAS, or Partnerſhip, is a Contract, by which the Goods or Labour of two or more are united in a common Stock, for the ſake of ſharing in the Gain.

13. The Gain and Loſs of the Partners were adjuſted, according to the value of what each had contributed:

tributed: and the ſame proportions were obſerved in both.

14. The Renunciation of any one of the Partners, though without the conſent of the others, put an end to the Partnerſhip.

15. Partnerſhip, in the laws of England, is chiefly conſidered with reſpect to Lands, and other Eſtates, which are held by a plurality of Tenants. Such Eſtates are 1. In Joint-Tenancy. 2. In Coparcenary. 3. In Common.

16. V. MANDATUM, or a Commiſſion, is a Contract, by which a lawful buſineſs is committed to the management of another, and by him undertaken to be performed, without pay or reward.

17. A Commiſſion might be conſtituted for the Benefit 1. of the Mandator. 2. of the Mandator and Mandatee. 3. of a third Perſon. 4. of a third Perſon and the Mandator. 5. of a third Perſon and the Mandatee.

18. A Commiſſion for the ſole Benefit of the Mandatee was of no force.

19. In the laws of England, the Contract of *Mandatum* is of no uſe.

CHAP.

CHAP. XIX.

Of Obligations QUASI EX CONTRACTU, *or from Improper Contracts.*

Inſt. Lib. III. Tit. 28. 29.
Hoppii *Comm.* Lib. III. Tit. 28. 29.
Heinecc. *A. R.* } Lib. III. Tit.
——— *El. J. C.* } 28. 29.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 6.
Blackſtone's *Comm.* B. II. Ch. 30. B. III. Ch. 9.

1. IMPROPER or QUASI Contracts were thoſe, in which the Obligation was founded on the Conſent of the Parties, not expreſſed, but preſumed. Theſe were ſix in number. I. NEGOTIORUM GESTIO. II. TUTELA. III. REI COMMUNIS, *vel* IV. HÆREDITATIS ADMINISTRATIO. V. HÆREDITATIS ADITIO. VI. INDEBITI SOLUTIO.

2. NEGOTIORUM GESTIO, or a Contract for buſineſs done, was that, by which One, who, without Commiſſion, had undertaken the management of the buſineſs of an abſent perſon, and He, whoſe buſineſs was ſo undertaken, were reciprocally bound to each other: the one, to execute the buſineſs with fidelity and diligence; the other, to reimburſe the expences incident to the proſecution of it.

3. TUTELA was a Contract between Tutor and Pupil; by which the former was bound to adminiſter faithfully the affairs of his Pupil, and the latter to indemnify the Tutor for all expences incurred in the due execution of his office.

4. REI COMMUNIS ADMINISTRATIO was a Contract between two or more perſons, to whom the ſame thing had been given, or left by way of Legacy; by which each was bound to divide the thing ſo poſ-

ſeſſed

ſeſſed in common, and to allow for all extraordinary coſts in the care or keeping of it.

5. HÆREDITATIS ADMINISTRATIO was a Contract between Coheirs to the ſame eſtate; by which each was bound to divide the Inheritance, and to ſettle all accounts relating to it, in a fair proportion.

6. HÆREDITATIS ADITIO was a Contract, by which an Heir, accepting the Inheritance, was bound to the Legatees, to pay them the Legacies left by the Teſtator.

7. INDEBITI SOLUTIO was a Contract, by which he, who, by miſtake, had been paid what was not due to him, was bound to make Reſtitution to the perſon who had paid him.

8. In ſome caſes, this neceſſity of Reſtitution was remitted.

9. Implied Contracts are not unknown in the laws of England.

10. Obligations, whether ariſing from Proper or Improper Contracts, might be acquired immediately, by a man's ſelf; or mediately, by others, whom he had under power; as a Son and a Slave.

CHAP.

CHAP. XX.

Of the Ways by which Obligations, arising from Proper and Improper Contracts, were DISSOLVED.

Inſt. Lib. III. Tit. 30.
Hoppii *Comm.* Lib. III. Tit. 30.
Heinecc. *A. R.* Lib. III. Tit. 30. pr. § 1. 9—16.
——— *El. J. C.* Lib. III. Tit. 30.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 9.
Blackſtone's *Comm.* B. III. Ch. 20.

1. OBLIGATIONS, ariſing from Proper and Improper Contracts, were DISSOLVED 1. by the help of an Exceptive Plea. 2. by the operation of Law.

2. The Ways, by which Obligations were diſſolved by the Operation of Law, were I. Common to all Contracts. II. Peculiar to ſome excluſive of others.

3. I. The Ways of diſſolving an Obligation, Common to all Contracts, were five. 1. SOLUTION. 2. COMPENSATION. 3. CONFUSION. 4. OBLATION. 5. NOVATION.

4. SOLUTION is, when a Debtor, or ſome other in his name, makes an actual ſatisfaction to the proper Creditor, by the payment of what is due.

5. COMPENSATION, or Stoppage, is a Reckoning between Debtor and Creditor, by which the Debtor *ſets off* what is due to him from the Creditor, in order to leſſen or extinguiſh his debt.

6. CONFUSION is, when the Obligation of the Debtor and Right of the Creditor are united in the ſame Perſon.

7. OBLATION is a tender of the Debt in Money to the Creditor; which Money, if refuſed without cauſe,

cauſe, was afterwards ſealed up, and depoſited with the Magiſtrate. This was called *Oblatio et Conſignatio.*

8. NOVATION is the change of a former Obligation into another of the ſame or a different kind. This might be 1. by a change of the Perſons; which was called DELEGATION. 2. by a change in the Obligation, the Perſons continuing the ſame.

9. Novations were 1. Voluntary, by agreement of the parties. 2. Neceſſary, by conteſtation of ſuit.

10. II. The Ways of diſſolving an Obligation, Peculiar to ſome Contracts, excluſive of others, were two. 1. ACCEPTILATION. 2. MUTUAL CONSENT.

11. ACCEPTILATION is an imaginary Payment, when a Creditor acknowledges he has been paid a debt he has not actually received, with an intention to diſcharge his Debtor.

12. Acceptilation was peculiar to Verbal Obligations, contracted by the way of Stipulation. The Form of a General Diſcharge, invented by *Gallus Aquilius*, and called *Stipulatio Aquiliana*, by which Obligations of all kinds were firſt reduced to Verbal, and then diſſolved by Acceptilation; * explained.

13. MUTUAL CONSENT is, when all the parties, by agreement, recede from an Obligation, not yet completed. This was peculiar to the Contracts, called Conſenſual.

* The Form was this: Mævius, the Creditor, firſt of all propoſed a Queſtion to Titius, his Debtor: *Quicquid te mihi,* EX QUACUNQUE CAUSA, DARE FACERE *oportet, oportebit; Præſens, in Diemve, aut ſub Conditione; Quarumque rerum mihi tecum* ACTIO *eſt, quæque vel adverſus te* PETITIO, *vel adverſus te* PERSECUTIO *eſt, eritve; Quodque tu meum* HABES, TENES, POSSIDES; *dolove malo feciſti, quo minus Poſſideas: Quanti quæque earum rerum res erit,* TANTAM PECUNIAM TU MIHI DARE SPONDES? To which the Anſwer, returned by Titius, was, SPONDEO. After this, Titius, the Debtor, propoſed a Queſtion to Mævius, his Creditor, thus: *Quod tibi jam me daturum ſpopondi,* ID HABESNE A ME ACCEPTUM? To which if the Anſwer by Mævius was, HABEO A TE ACCEPTUM; every Obligation, of whatever kind, was diſſolved, and Titius, the Debtor, was entirely diſcharged.

CHAP.

CHAP. XXI.

Of Obligations EX DELICTO, *or from* OFFENCES *properly ſo called.*

Inſt. Lib. IV. Tit. 1. pr.
Heinecc. *A. R.* } Lib. IV.
———*El. J.C.* } Tit. 1.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 7.
Eſprit des Loix, Liv. VI. Ch. 9—20.
Grotius *de J. B. et P.* Lib. II. Cap. XVII. § 1—11. Cap. XX. § 1—9. § 28—37.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 17. 18.
Blackſtone's *Comm.* B. IV. Ch. 1. 2. 3.
Principles of Penal Law. London, 1771. 2d. Ed. Ch 2. 11.

1. IN CONTRACTS, the Obligation of the parties is voluntary: in OFFENCES, the Law obliges them, whether they will or no.

2. OFFENCES are acts, wilfully committed in violation of Law.

3. Offences, as doing Damage, oblige the Offender to make REPARATION: as indicating a vitious Will, they render him liable to ſuffer PUNISHMENT.

4. PUNISHMENT is an Evil ſuffered for an Evil done.

5. The End of Puniſhment is to prevent future Offences.

6. All Perſons are CAPABLE of committing Offences, and liable to the Puniſhments appropriated to them, who labour under no Defect of Will.

7. Offences are 1. PRIVATE 2. PUBLIC.

8. PRIVATE Offences, called in the Roman law *Maleficia* or DELICTA, and in the laws of England CIVIL INJURIES, are a violation of the rights due to Individuals.

9. PUBLIC

9. PUBLIC Offences are a violation of the rights due to the Community: Theſe are conſidered under the third general diviſion of the Objects of the Civil Law, which treats of ACTIONS.*

10. The PROSECUTION of Private Offences, by the Roman law, was 1. CIVIL. 2. CRIMINAL.

11. The CIVIL Proſecution of Private Offences was, in order to redreſs an Injury, as it affected an Individual. This Redreſs was obtained 1. by Reparation of the Damage done. 2. by the Puniſhment of the Offender. 3. by Both.

12. The CRIMINAL Proſecution of Private Offences was, in order to puniſh a Crime, as it affected the Community. This was done 1. by Corporal Puniſhment. 2. by a Pecuniary Fine, payable to the Exchequer.

13. DELICTA, or Private Offences, properly ſo called, were in number four. I. FURTUM. II. RAPINA. III. DAMNUM. IV. INJURIA.

CHAP. XXII.

Of FURTUM, *or* THEFT.

Inſt. Lib. IV. Tit. 1.
Hoppii *Comm.* Lib. IV. Tit. 1.
Heinecc. *A. R.* } Lib. IV.
———*El. J. C.* } Tit. 1.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 7.
Eſprit des Loix. Liv. XXIX. Ch. 12. 13.
Grotius *de J. B. et P.* Lib. II. Ch. I. § 12. 13.
Rutherforth's *Inſt. of Nat. Law.* Vol. I. Ch. 16.
Wood's *Inſt. of Laws of England.* B. III. Ch. 1.
Blackſtone's *Comm.* B. IV. Ch. 16. 17.
Principles of Penal Law. Ch. 22.

1. FURTUM, or Theft, is the fraudulent taking, and carrying away, of the moveable goods of another, for the ſake of gain.

2. Theft might be committed, not only by ſubtraction

* See Book III. Chap. XII.

tion of the Thing itſelf, belonging to another, but alſo by taking away the Uſe or the Poſſeſſion of it.

3. Theft could not regularly be committed in ſuch Things as had no Owner.

4. FURTUM, by the old Roman law, was divided into four kinds. 1. *Conceptum.* 2. *Oblatum.* 3. *Prohibitum.* 4. *Non Exhibitum.*†

5. CONCEPTUM was, when the Thing ſtolen was ſearched for, and found upon the Thief before witneſſes. The ancient method of inquiring after things ſtolen, *per Lancem et Licium*; explained.

6. OBLATUM was, when the Thing ſtolen was found upon one, who had received it from the Thief, not knowing it to have been ſtolen.

7. PROHIBITUM was, when one was hindered from enquiring after a Thing ſtolen, in the preſence of witneſſes.

8. NON EXHIBITUM was, when one refuſed to exhibit a Thing ſtolen, that had been ſearched for, and found in his poſſeſſion.

9. Theft, by the later law of the Romans, was 1. MANIFEST. 2. NOT MANIFEST.

10. MANIFEST Theft was, when the Thief was taken in the fact; or apprehended, with the goods upon him, before he had carried them to the place, where they were to remain that night. A Thief, ſo apprehended in England, is ſaid to be taken *with the Maner*, or *in flagranti delicto.*

11. NOT MANIFEST Theft was, when the Thief was not taken in the fact, but after he had carried the goods to the place deſigned.

12. Theft was further diſtinguiſhed into DIURNAL and NOCTURNAL. The latter anſwers to what is called, in the law of England, BURGLARY; or the break-

† *Furtum*, in the Latin language, is uſed, either to ſignify the Act of Theft, or *Res Furtiva*, the Thing ſtolen. In this latter ſenſe it is to be underſtood, when joined by the Roman lawyers with the words *Conceptum, Oblatum, Prohibitum, Non Exhibitum.*

breaking and entering, by Night, into a Dwelling-houſe, with intent to commit a Felony: The Puniſhment of which is Death.

13. LARCINY, or Theft, by the law of England, is the felonious taking, and carrying away, of the perſonal goods of another: and is 1. SIMPLE. 2. MIXT.

14. SIMPLE Larciny is the felonious taking, and carrying away, of the perſonal goods of another, but neither from the houſe, nor the perſon, of the owner, nor by night.

15. Simple Larciny is 1. Grand, when above the value of twelve-pence: the Puniſhment of which is, generally, Death. 2. Petit, when of the value of twelve-pence or under: the Puniſhment of which is Whipping or Tranſportation.

16. MIXT Larciny is the felonious taking, and carrying away, of the perſonal goods of another, 1. from the Houſe: the Puniſhment of which is, generally, Death. 2. from the Perſon.

17. In a Civil Proſecution of Theft, the party injured might ſue 1. for the Reſtitution of the Thing ſtolen. 2. for the Puniſhment of the Thief: Which puniſhment was a forfeiture of four times the Value, when the Theft was Manifeſt; or of double the Value, when the Theft was Not Manifeſt. 3. for Both.

18. In a Criminal Proſecution of Theft, the Puniſhment was different at different times; but was never Death, except in the caſe of a Slave, till the age of the later Emperors.

19. The Proſecution of Theft was allowed, not only to the owner of the Thing ſtolen, but to any other perſon, who had an intereſt in its ſafety.

CHAP. XXIII.

Of RAPINA, *or* ROBBERY.

Inſt. Lib. IV. Tit. 2.
Hoppii *Comm.* Lib. IV. Tit. 2.
Heinecc. *A. R.* } Lib. IV.
——— *El. J. C.* } Tit. 2.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 7.
Wood's *Inſt. of Laws of England.* B. III. Ch. 1.
Blackſtone's *Comm.* B. IV. Ch. 17.
Principles of Penal Law. Ch. 22.

1. RAPINA, or Robbery, is the violent taking, from the Perſon of another, of money or goods, for the ſake of gain.

2. Rapine, or Robbery from the Perſon, related to ſuch goods as were Moveable: When Immoveable goods were violently taken from the poſſeſſor, the offence was called INVASION.

3. A man was not permitted to take by Violence from another, even what he had reaſon to believe his own.

4. In a Civil Proſecution of Robbery, the Puniſhment was a forfeiture of four times the Value, if the offence was proſecuted within the year; or of the ſimple Value, if proſecuted after the year. But in the forfeiture of four times the value, the Reſtitution of the Thing itſelf was included.

5. The Criminal Proſecution was appropriated to ſuch Robberies as were of the more deſperate kind; and the Puniſhments were different, according to the circumſtances of the Fact.

6. The Proſecution of Robbery was allowed, not only to the Owner of the goods taken by the Robber, out to any other perſon, who had an intereſt in their ſafety.

7. In England, that ſpecies of Mixt Larciny, which is called Larciny from the PERSON, is ſubdivided

into two kinds. 1. PRIVATE STEALING, above the value of twelve-pence. 2. ROBBERY; or the felonious and violent taking, from the Perſon of another, of money or goods, to any value, putting him in Fear. The Puniſhment of both is Death.

CHAP. XXIV.

Of DAMNUM, *or* DAMAGE.

Inſt. Lib. IV. Tit. 3.
Hoppii *Comm.* Lib. IV. Tit. 3.
Heinecc. *A. R.* } Lib. IV.
——— *El. J. C.* } Tit. 3.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 7.
Wood's *Inſt. of Laws of England.* B. I. Ch. 6.
Blackſtone's *Comm.* B. III. Ch. 8. 12. B. IV. Ch. 14. 15.

1. DAMNUM, or Damage, is the Loſs or Diminution of what is a man's own, occaſioned by the Fraud or Fault of a free man.

2. The Redreſs of Damages was the Object of the AQUILIAN Law.

3. The Aquilian law conſiſted of three parts. In the Firſt it was provided, That He who Killed a Slave belonging to another, or ſuch of his Beaſts as went under the denomination of Cattle, ſhould forfeit to the Owner the higheſt price, ſuch Slave or Beaſt might have been ſold for, at any time within a Year before the wound was given.

4. When a Slave or Beaſt was ſlain by Accident, or in the way of Self-Defence; the Slayer was not ſubjected to the penalty of the Aquilian law. The Killing of a Human Creature, in ſuch circumſtances, is called, in the laws of England, Excuſable Homicide.

5. In the caſe of a Slave, ſlain maliciouſly, the Slayer, beſides being liable to be ſued for Damages, was alſo obnoxious to Capital Puniſhment, as guilty of a Public

lic Crime. In England, a perſon, after being proſecuted Criminally for Felony, may be ſued in a Civil Action for Damages, at the inſtance of the injured Party.

6. The Second part of the Aquilian law is loſt; but probably related to the caſe of Corrupting a Slave belonging to another, for which it preſcribed a Penalty.

7. In the Third part of the Aquilian law it was provided, That He who Wounded the Slave or Cattle of another; or Killed, Wounded, or Hurt any other part of his property, animate or inanimate; ſhould forfeit to the Owner the higheſt price, the Beaſt or Goods might have been ſold for, at any time within thirty days before the damage was done.

8. A Freeman, that was Wounded, had no *direct* remedy from this part of the Aquilian law; Yet, by an equitable interpretation, ſuch a one could ſue for the loſs of his Time, and the expence of his Cure.

9. In England the malicious Killing, or Maiming, of a Human Creature is puniſhed with Death. The malicious Killing, or Maiming, of Cattle; and the Beating, Confining, or Diſabling of a Servant, belonging to another; are remedied by Actions of Treſpaſs; on the caſe, or *Vi et armis*.

10. The Aquilian law, now explained, related to the caſe of Damage *Done*; called *Damnum Datum*. Damage was further conſidered 1. as *Doing*. 2. as *not yet Done*. The Redreſs of the former was had from the Prohibition of the Prætor, called *Nuntiatio Novi Operis*; of the latter, from what was called *Cautio de Damno Infecto*.

CHAP. XXV.

Of INJURIA, *or* INJURY.

Inſt. Lib. IV. Tit. 4.
Hoppii *Comm.* Lib. IV. Tit. 4.
Heinecc. *A. R.* } Lib. IV.
——— *El. J. C.* } Tit. 4.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 7.
Eſprit des Loix. Liv. VI. Ch. 15. 19.
Wood's *Inſt. of Laws of England.* B. III. Ch. 3.
Blackſtone's *Comm.* B. III. Ch. 8. B. IV. Ch. 11.

1. INJURIA, or Injury, is any thing maliciouſly Done or Said, by which another is hurt in his Body or Reputation.

2. Injuries were I. REAL. II. VERBAL: and both were divided into 1. Simple. 2. Atrocious.

3. REAL Injuries were thoſe, in which an unlawful Act was Done.

4. VERBAL Injuries were thoſe, in which ſlanderous and malicious Words were Spoken.

5. Under Verbal Injuries were included LIBELS;* or malicious Defamations of another, in writing, or otherwiſe, tending to diminiſh his good name and reputation.

6. In what caſes the Truth of Defamatory Words, Spoken

* A Libel, in the Roman law, is called *Famoſus Libellus*; and, by a Conſtitution of the Emperors Valentinian and Valens, the Finder and Publiſher of a Libel was equally obnoxious to puniſhment as the Author. *Si quis Famoſum Libellum ſive domi, ſive in publico vel quocunque loco, ignarus repererit; aut corrumpat priuſquam alter inveniat, aut nulli confiteatur inventum. Si vero non ſtatim eaſdem chartulas vel corruperit, vel igni conſumpſerit, ſed vim earum manifeſtaverit; ſciat ſe, tanquam Auctorem hujuſmodi Delicti, capitali ſententiæ ſubjugandum.* C. 9. 36. It is curious to obſerve, how cloſely this Conſtitution is copied in the Statutes of the Univerſity of Cambridge. *Qui Famoſum Libellum, ſive domi ſive foras, ignarus repererit; aut corrumpat, aut igni tradat, antequam alter inveniat. Qui vero alteri fateatur inventum, et vim illius declaraverit; ſciat ſe, tanquam Auctorem Delicti, puniendum, et Univerſitate expellatur.* Stat. Eliz. C. xlvii. *De Modeſtia et Morum Urbanitate.*

Spoken or Written, would ſerve to excuſe the Defamer; explained.

7. Injuries might be committed againſt a man's own perſon, or againſt thoſe who were under his protection. An Injury done to a Slave was an Injury to his Maſter.

8. The Redreſs of Injuries was had from the Decemviral law, the law of the Prætor, and the *Lex Cornelia.*

9. By the Decemviral law, the Puniſhment of a Real Injury, in the caſe of a broken Limb, was Retaliation; of a Verbal Injury, of the Atrocious ſort, the Puniſhment was Death. Injuries of a lighter kind, Real or Verbal, were puniſhed by a pecuniary Fine.

10. The Law of the Prætor allowed the party injured to eſtimate the Damage received; which the Judge might follow, or leſſen, at diſcretion.

11. The *Lex Cornelia* related to Real Injuries offered to the Body, ſuch as in England are called BATTERY; and to the entry into the Houſe of another by force: for which the Party injured had a recompence in Damages.

12. The Injurious party, beſides a Civil, was liable to a Criminal proſecution, both by the Prætorian and Cornelian laws.

13. In a Criminal Proſecution, the Puniſhment for Atrocious Injuries was Death, or Baniſhment: for Injuries of a leſs heinous ſort, the offender was rendered incapable of being a Witneſs, or of making a Teſtament.

14. Injuries to the Body or Reputation may be proſecuted in England 1. by Action, at the ſuit of the party injured. 2. by Indictment or Information, at the ſuit of the Crown. By the former method, the party injured has a recompence in Damages: by the latter, the Offender is ſubjected to a Corporal Puniſhment, or a pecuniary Fine.

15. Injuries were Aboliſhed 1. by Death; whether of the Injurious, or the Injured party. 2. Remiſſion. 3. Satisfaction. 4. Preſcription.

CHAP. XXVI.

Of Obligations QUASI EX DELICTO, *or from Improper Offences.*

Inſt. Lib. IV. Tit. 5.
Hoppii *Comm.* Lib. IV. Tit. 5.
Heinecc. *A. R.* } Lib. IV. Tit.
———*El J.C.* } 5.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 8.
Blackſtone's *Comm.* B. III. Ch. 9. 25.

1. IMPROPER Offences, or QUASI DELICTA, were thoſe, in which an unlawful act was committed through negligence, without ill deſign. Theſe were four in number, I. An Erroneous Sentence given by a Judge. II. Things Thrown or Poured from a Houſe. III. Things Hung or Placed ſo as to be dangerous to thoſe who paſſed under. IV. Things Damaged or Stolen in a Ship or Inn.

2. I. If a Judge, through Ignorance of the Law, pronounced an Erroneous Sentence; he *made the Suit his own*, and became liable to pay the Damage which ſuch Sentence had occaſioned.

3. II. When Things were Thrown or Poured from a Houſe, without deſign, by which Paſſengers were hurt or incommoded; the Inhabitant of that Houſe, whether Proprietor or Tenant, was compellable to make Reparation for the Damage done.

4. III. When things were Hung or Placed in any ſuch way, as to be dangerous to thoſe who paſſed under them; the Owner was puniſhable by Fine, whether any one were hurt by their fall or not.

5. IV. When Things were Damaged or Stolen by any of the Servants belonging to a Ship or Inn; the Maſter of ſuch Ship or Inn was liable to pay the double value. When the Damage or Theft was done by a Stranger or Perſons unknown, the Maſter was ſimply obliged to make good the loſs.

6. In certain caſes, Improper Offences are puniſhable by the laws of England.

BOOK THE THIRD.

Of ACTIONS.

CHAP I.

Of ACTIONS *in general, and their ſeveral* KINDS.

Inſt. Lib. IV. Tit. 6.
Hoppii *Comm.* Lib. IV. Tit. 6.
Heinecc. *A. R.* Lib. IV. Tit. 6. § 23—38.
——— *El. J. C.* Lib. IV. Tit. 6.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 1. 3.
Wood's *Inſt. of Laws of Eng.* B. IV. Ch. 4.
Blackſtone's *Comm.* B. III. Ch. 1. 8. 9. 10. 11.

1. IN caſe of Privation or Infringement of a man's Rights, the Law of Nature and of each particular Society entitles the injured party to REDRESS.

2. The MEANS, or Inſtruments, by which Redreſs is principally to be obtained, are Civil Suits, or Actions, in a Court of Juſtice.

3. ACTIONS are the legal demand of a man's Right; or the Means, which the Law puts into his hands of purſuing and recovering thoſe Rights, whether perfect or imperfect, of which he is unjuſtly deprived.

4. Actions, in the Roman law, with reſpect to their Origin, were 1. Civil. 2. Prætorian. With reſpect to their Subject, they were diſtinguiſhed into 1. Real. 2. Perſonal. 3. Mixt.

5. REAL Actions, otherwiſe called VINDICATIONS, were thoſe, in which a man demanded ſome certain Thing that was *his own*; and were founded on Dominion, or *Jus in Re*. PERSONAL Actions, denominated

minated alſo CONDICTIONS, were thoſe, in which a man demanded what was barely *due* to him; and were founded on Obligation, or *Jus ad Rem.* MIXT Actions were thoſe, in which ſome ſpecific Thing was demanded, and alſo ſome perſonal Obligations were claimed to be performed.

6. REAL Actions were 1. *Rei Vindicatio*, properly ſo called. 2. *Actio Confeſſoria.* 3. *Negatoria.* 4. *Publiciana.* 5. *Reſciſſoria.* 6. *Pauliana.* 7. *Serviana.* 8. *Quaſi-Serviana.* 9. *Actiones Præjudiciales.*

7. REI VINDICATIO was granted to the owner of a certain Corporeal Thing, in order to have it reſtored by the perſon in Poſſeſſion. To this Action, which determined the right of Property, another was previouſly neceſſary, called LIS VINDICIARUM, in order to determine the right of Poſſeſſion, during the time of ſuit.*

8. *Actiones* CONFESSORIA *et* NEGATORIA related to Incorporeal Things, or SERVICES. By the former, one *claimed* a Service, real or perſonal, in an Eſtate belonging to another: By the latter, the owner of a particular Eſtate *denied* that ſuch Eſtate was obnoxious to a Service.

9. *Actio* PUBLICIANA was inſtituted by one, who had

* See the Oration of Cicero *pro Muræna*, c. 11. 12. where the Form of claiming the poſſeſſion of an Immoveable is preſerved. In the Story of Appius and Virginia, related by Livy, in his third Book, the great aggravation of the injury, there complained of, conſiſted in this; that Appius aſſigned Virginia to Claudius, who claimed her as his *ancilla*; or decreed the *Vindiciæ*, (that is, the *poſſeſſion* of Virginia, till ſuch time as her State, whether of Freedom or Slavery, could be tried) *ſecundum ſervitutem*, in favour of ſlavery; inſtead of *ſecundum libertatem*, in favour of liberty; as the law required. *Appius, amore ardens,—M. Claudio clienti negotium dedit, ut Virginem in ſervitutem aſſereret, neque cederet ſecundum libertatem poſtulantibus Vindicias.—Ad tribunal Appii perventum eſt. Notam Judici fabulam Petitor, quippe apud ipſum auctorem argumenti, peragit, Puellam domi ſuæ natam, furtoque inde in domum Virginii tranſlatam; id ſe—probaturum:—interim dominum ſequi ancillam, æquum eſſe. Advocati Puellæ poſtulant, ut rem integram in Patris adventum differat; lege ab ipſo lata Vindicias det ſecundum libertatem.*

had Loſt a Thing, of which he had *bona fide* obtained the poſſeſſion; in order to have it reſtored, under colour that he had acquired a property in it by Preſcription.

10. *Actio* RESCISSORIA was inſtituted by one, who on account of abſence had loſt his right of Property in a Thing, which another had acquired by the Title of Preſcription; in order to have it reſtored, under colour that no ſuch Preſcription had taken place.

11. *Actio* PAULIANA was granted to Creditors, for the recovery of goods, fraudulently alienated by their Debtors.

12. *Actio* SERVIANA was granted to the Letter of a Rural Eſtate, for the recovery of goods, obligated by the Hirer as a ſecurity for his Rent.

13. *Actio* QUASI-SERVIANA was granted to Creditors, to obtain poſſeſſion of goods, pledged or hypothecated by their Debtors.

14. *Actiones* PRÆJUDICIALES (ſo called becauſe they were to be *firſt* decided before the principal action could be brought) were thoſe inſtituted concerning a man's Civil State or Condition. Theſe were three in number. 1. *de Libertate.* 2. *de Ingenuitate.* (both called *Actiones ex Cauſa Liberali)* 3. *de Partu Agnoſcendo.*

15. PERSONAL Actions aroſe 1. from LAW. 2. from EQUITY. 3. from CONTRACTS. 4. from OFFENCES.

16. Perſonal Actions ariſing from LAW, called *Condictiones ex Lege*, had place, when an Obligation had been introduced by a new Law, and no particular Action had been expreſſed, by which that Obligation might be enforced.

17. Of this ſort were the Condictitious Actions, granted to *Rei*, or Defendants, *contra Actores plus petentes*, againſt Actors, or Plaintiffs, who had inſerted in their Libels a greater ſum than was due: and *contra Viatores ſive Executores Litium*, againſt the Officers of

of a Court of Juſtice, who had been guilty of exaction, contrary to Law.

18. Of Perſonal Actions ariſing from EQUITY, the principal were 1. *Actio ad Exhibendum*, to compel the poſſeſſors of moveable Goods to Exhibit them to the perſons intereſted in having them produced. 2. *Reſtitutiones in Integrum*, to reſcind the Contracts of Minors, and ſuch as had been made through Fear or Fraud.

19. Perſonal Actions, ariſing from CONTRACTS, were of various kinds; correſponding to the ſeveral ſpecies of Contracts, Proper and Improper, explained in the ſecond Book.

20. Proper Contracts were 1. Innominate; to each of which was appropriated a general Action on the caſe, called *Actio in Factum*, or *præſcriptis verbis*. 2. Nominate; which were 1. Real. 2. Verbal. 3. Literal. 4. Conſenſual.

21. Real Contracts were 1. *Mutuum*. 2. *Commodatum*. 3. *Depoſitum*. 4. *Pignus*. The Actions belonging to which were 1. *Ex Mutuo*, and *Condictio Certi*. 2. *Actio Commodati, directa et contraria*. 3. *Depoſiti, directa et contraria*. 4. *Pignoratitia, directa et contraria*.

22. Verbal Contracts were 1. *Stipulatio*. 2. *Fidejuſſio*. From theſe came 1. *Actio Certi ex Stipulatu*, when the Stipulation concerned a *res certa*: *Incerti ex Stipulatu*, when it concerned a *res incerta*. 2. *Beneficia Diviſionis, Ordinis, Cedendarum Actionum*. From Literal Contracts came *Condictio ex Chirographo*.

23. Conſenſual Contracts were 1. *Emptio Venditio*. 2. *Locatio Conductio*. 3. *Emphyteuſis*. 4. *Societas*. 5. *Mandatum*. The Actions belonging to which were 1. *Empti; Venditi: Redhibitoria: Quanti Minoris*. 2. *Locati; Conducti*. 3. *Emphyteuticaria, directa et contraria*. 4. *pro Socio*. 5. *Mandati, directa et contraria*.

24. Improper Contracts were 1. *Negotiorum Geſtio*. 2. *Tutela*. 3. *Rei Communis Adminiſtratio*. 4. *Hæreditatis Adminiſtratio*. 5. *Hæreditatis Aditio*. 6. *Indebiti Solutio*. To theſe belonged the Actions 1. *Negotiorum Geſtorum, directa et contraria*. 2. *Tutelæ, directa et con-*

contraria. 3. *Communi Dividundo.* 4. *Familiæ Erciſcundæ.* 5. *ex Teſtamento.* 6. *Condictio Indebiti.*

25. To Perſonal Actions, ariſing from Improper Contracts, may be referred 1. *Actio de Conſtituta Pecunia*; for the payment of money *conſtituted*, or promiſed, without any preceding Stipulation. 2. *de Peculio*; when one had contracted with the Son or Slave of another, to compel the Father or Maſter to perform the Contract, as far as the *Peculium* of each would extend. 3. *de Jurejurando Voluntario*; when one, at the inſtance of the adverſe party, had ſworn that a debt was really due to him, to compel the adverſary to the payment of it.

26. Perſonal Actions, ariſing from OFFENCES, correſponded to the ſeveral ſpecies of Offences, Proper and Improper, explained in the ſecond Book.

27. Proper Offences were 1. *Furtum.* 2. *Rapina.* 3. *Damnum.* 4. *Injuria.* To theſe belonged 1. *Actio Furti: Condictio Furtiva.* 2. *de Vi Bonorum Raptorum*; or *Actio Furti.* 3. *ex Lege Aquilia.* 4. *Injuriarum*; *Decemviralis*, *Prætoria*, *ex Lege Cornelia.*

28. To Perſonal Actions, ariſing from Proper Offences, may be referred 1. *Actio de Albo Corrupto*; againſt him, who had defaced or damaged the Tablet, on which the Prætor propoſed his Edict. 2. *de in Jus Vocando*; againſt a Son or *Libertus*, who had commenced a ſuit againſt a Parent or Patron, without leave from the Prætor. 3. *de in Jus Vocato Non Eximendo*; againſt thoſe, who had prevented a perſon's appearance to a proceſs in a court of Juſtice, on the day agreed on. 4. *de Servo Corrupto*; againſt him, who had corrupted the Morals of a Slave. 5. *de Calumniatoribus*; on account of Money given to move, or not to move, a ſuit againſt another, to compel the receiver to make Reſtitution.

29. From Improper Offences aroſe a general Action on the caſe, called *Actio in Factum*, or *præſcriptis verbis.*

30. MIXT Actions were 1. *Hæreditatis Petitio*; in-

inſtituted by an Heir, in order to have the Inheritance reſtored by the perſons in poſſeſſion. 2. The three Actions called *Judicia Diviſoria:* viz. *Communi Dividundo: Familiæ Erciſcundæ:* (both alſo reckoned among Actions merely Perſonal) and *Finium Regundorum*, inſtituted to ſettle the bounds of contiguous Rural Eſtates.

31. Actions were perſecutory 1. of the Thing. 2. of the Penalty. 3. of Both.

32. Actions might be laid for the recovery of the Simple, Double, Triple, or Quadruple value, of the loſs ſuſtained: beyond which no penal action could extend.

33. Actions were 1. *Bonæ Fidei*; in which the Judge, appointed by the Prætor, was allowed to eſtimate what was due from the litigant parties, according to Equity and Good Faith. 2. *Stricti Juris*; in which the Judge was reſtrained to the expreſs words of convention between the parties. 3. *Arbitrary*; in which the *Reus*, refuſing to make the ſatisfaction required, was condemned at the Arbitration of the Judge.

34. To Actions *Bonæ Fidei* belonged 1. *Actio ex Stipulatu de Dote repetenda*; granted to the Wife for the recovery of her *Dos*. 2. *de Æſtimato*; granted to him who had delivered to another a thing, *eſtimated* at a certain price, on purpoſe that it might be ſold; to have the thing reſtored, or the price paid. 3. *ex Permutatione*; granted to him, who had delivered a thing to another, by way of *Exchange*; to have the thing promiſed in return, or its value: With many other Actions beſides.

35. An example of an *Arbitrary* Action was that *de eo quod Certo Loco:* when a Thing, ſtipulated to be given or done at one Certain Place, was demanded by the Actor at another; the Judge allowing for the loſs incurred by the *Reus*, in performing his engagements at a different place from that agreed on.

36. In ſome Actions a Certain Thing was demanded; in others an Uncertain: But in either caſe the

Actor

Actor was liable to a penalty, if he demanded *more* than his due. More than was due might be demanded four ways; *Re*, *Cauſa*, *Loco*, *Tempore*.

37. In ſome Actions, an Actor might ſue for the Whole of what was due to him; in others he was reſtrained to ſue for *leſs* than the Whole.

38. When an Actor was reſtrained to ſue for *leſs* than the Whole, ſuch reſtraint aroſe 1. from the nature of the Action itſelf. 2. from Compenſation or Stoppage. 3. from a Benefit, or Privilege, indulged to particular perſons: which was of two ſorts; (1) *Beneficium Competentiæ*. (2) *Beneficium Ceſſionis*.

39. Actions were 1. Direct, which deſcended from the expreſs words of the Law. 2. Uſeful, which deſcended from the meaning and interpretation of the Law.

40. Sometimes the *Reus* would inſtitute an Action, or Croſs-bill, againſt the Actor, in the way of Compenſation or Set-off: This was called *Mutua Petitio*, or RECONVENTIO.

41. In the Laws of England Civil Actions are 1. Real. 2. Perſonal. 3. Mixt.

42. Real Actions are thoſe relating to Real Property or Lands; by which one claims Title to have a Freehold in Lands, Tenements or Hereditaments, in fee-ſimple, fee-tail, or for life.

43. Perſonal Actions are thoſe which one man brings againſt another, 1. on account of a Contract or Debt for Goods and Chattels. 2. on account of an Offence or Treſpaſs againſt his Perſon or Goods.

44. Mixt Actions are thoſe, in which ſome Real Property is demanded, and alſo Perſonal Damages for the Wrong ſuſtained.

45. He, who brings a Real Action, is called the *Demandant*; he, againſt whom it is brought, is called the *Tenant*. In Actions Perſonal and Mixt, the Parties are called *Plaintiff* and *Defendant*.

46. In caſe of *Ouſter*, or Diſpoſſeſſion of Real Property, whether by Abatement, Intruſion, or Diſſeiſin;

ſeiſin; the Remedy to the Demandant, or legal owner, againſt the Tenant, or unlawful poſſeſſor, is 1. by the mere Entry of him, who hath the right. 2. by Actions Poſſeſſory; which are (1) a Writ of Entry; to diſprove the Title of the Tenant. (2) an Aſſiſe; to prove the Title of the Demandant.

47. Real Actions are now out of uſe, and the Title to Lands is generally tried by a Writ of *Ejectione Firmæ*; where one, who hath the right, makes a Leaſe to another of Lands, for a Term of years; and a third perſon enters and ouſts the Leſſee; upon which the Leſſee brings an Action of Ejectment: by virtue of which the Title of the Leſſor comes to be tried; and the Leſſee recovers, from the Ejector or Tenant, his Term and Damages.

48. In caſe of Diſpoſſeſſion of Perſonal Property, the remedy to the Plaintiff, or legal owner, againſt the Defendant, or unlawful Poſſeſſor, is Reſtitution of the Goods, Taken or Detained; with ſatisfaction in Damages for the loſs incurred. Which Remedy is effected 1. by Action of Replevin; or Detinue. 2. of Trover and Converſion.

49. Perſonal Property, when in Action only, ariſes from Contracts; which are 1. Expreſs. 2. Implied. Expreſs Contracts are 1. Debts. 2. Covenants. 3. Promiſes or *Aſſumpſits*. Implied Contracts are ſuch as ariſe from reaſon and juſtice, which the Law *preſumes* a man has undertaken to perform.

50. In caſe of violation of Expreſs Contracts, the remedy is 1. by Action of Debt. 2. of Covenant. 3. on the caſe. For non-performance of Implied Contracts, the Remedy is by Action on the Caſe, grounded on the ſeveral preſumptive *Aſſumpſits* of the promiſer.

CHAP.

CHAP. II.

Of Actions ariſing from the CONTRACTS *of others; and of* NOXAL *Actions.*

Inſt. Lib. IV. Tit. 7. 8. 9.
Hoppii *Comm.* Lib. IV. Tit. 7. 8. 9.
Heinecc. *A. R.* } Lib. IV.
——— *El. J. C.* } Tit. 7. 8. 9.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 8.
Wood's *Inſt. of Laws of England.* B. II. Ch. 2.
Blackſtone's *Comm.* B. I. Ch. 8. B. III. Ch. 1. 12.

1. AN Action might ariſe from a CONTRACT, made either by the *Reus* himſelf, or by others under his power; as a Son or a Slave.

2. Of this latter kind were the Actions 1. *Quod Juſſu.* 2. *Exercitoria.* 3. *Inſtitoria.* 4. *Tributoria.* 5. *de in Rem Verſo.* 6. *de Peculio.*

3. *Quod Juſſu* was granted to thoſe, who had contracted with a Son or Slave, by Order of the Father or Maſter; to compel ſuch Father or Maſter to ſtand to the agreement.

4. *Exercitoria* was granted to thoſe, who had contracted with the Maſter of a Ship; to compel the Owner or Hirer of the Ship to perform whatever was comprehended in the Contract.

5. *Inſtitoria* was granted to thoſe, who had contracted with the Factor of another; to compel the Principal to Performance.

6. *Tributoria* was granted to the Creditors of a Son or Slave, engaged in Trade with conſent of the Father or Maſter; to compel ſuch Father or Maſter to diſtribute the goods, or money ariſing from the goods, in proportion to the demands of each Creditor.

7. *De in Rem Verſo* was granted to thoſe, who had contracted with a Son or Slave; in order to recover what-

whatever the Father or Maſter, by means of ſuch contract, had converted to their own advantage.

8. The Action *de Peculio* is explained in the preceding Chapter; pr. 25.

9. No Action was allowed for the recovery of money lent to a Son under power, without conſent of his Father. This was ordered by the *Sctum Macedonianum.*

10. In caſe of an OFFENCE committed by a SLAVE, and of DAMAGE done by a BEAST, the Maſter of the Slave and Owner of the Beaſt were liable to be convened, by what was called a NOXAL Action.

11. The Effect of ſuch a Noxal Action was; that the Maſter and Owner had the alternative, either to pay for the Damage done, or to deliver up the Slave or Beaſt to the Actor.

12. Damage done by an Irrational Animal was called PAUPERIES; and the Action, deſcending from it, was called *Actio de Pauperie.*

13. In caſe of Cattle ſtraying and *feeding* in another's ground, the owner of the ſoil had an Action *de Paſtu Pecorum*; to compel the owner of the cattle either to pay for the damage done, or to give up his cattle. In England, cattle *damage-feaſant* may be *diſtreined* by the owner of the ſoil, and ſecured, or *pounded*, till ſatisfaction be made for the injury; but no longer.

14. In caſe of *Hurt* received from an Animal kept near a public road, an Action on the caſe, *ex Edicto Ædilitio*, lay againſt the owner of the Animal for damages. In England, an Animal, or Thing Inanimate, which is the occaſion of death to a human creature, is forfeited, and becomes a DEODAND.

CHAP.

CHAP. III.

Of the PERSONS, *by and againſt whom Actions might be brought; and of the* CAUTIONS, *or Securities, demanded from them.*

Inſt. Lib. IV. Tit. 10. 11.
Hoppii *Comm.* Lib. IV. Tit. 10. 11.
Heinecc. *A. R.* } Lib. IV. Tit.
——— *El. J. C.* } 10. 11.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 1. 3.
Wood's *Inſt. of the Laws of England.* B. IV. Ch. 1. 4.
Blackſtone's *Comm.* B. III. Ch. 3. 18. 19.

1. BY the ancient Roman law, no Action or Exception could be brought in the name of *another*; but every Suitor was obliged to proſecute or defend his ſuit *in perſon*. The ſame practice obtained by the Common law of England, unleſs diſpenſed with by ſpecial licence from the Crown.*

2. A way was afterwards introduced of uſing the help of others, in proſecuting or defending a ſuit; by feigning that the Dominion or Property of the Suit was transferred on them; and by ordering that all acts in the progreſs of the cauſe ſhould be directed to and againſt them, inſtead of the Principals. The perſons ſo employed were called PROCURATORES, or PROCTORS.

3. A Proctor is one, who adminiſters the affairs of another, at the Mandate, or Commiſſion, of the Principal.

4. A Proctor was 1. Extrajudicial, otherwiſe called a

* The ſame practice alſo formerly obtained, and, unleſs diſpenſed with, ſtill obtains, in the Courts of the Univerſity of Cambridge. See Appendix, No. V. VI.

a Mandatee. † 2. Judicial, appointed to manage a Civil Suit or Action at Law. He who, without commiſſion, undertook the defence of a *Reus*, that was abſent, was called *Defenſor*.

5. To the Judicial Proctor of the Romans anſwers an ATTORNEY AT LAW in England: who is empowered, by ſeveral Statutes, to act in the place or *turn* of another, and to manage his matters of law.

6. In order that Judgments might not be eluded, certain CAUTIONS, or Securities, were given by the litigant parties, or their reſpective Proctors; which were called 1. *Judicatum ſolvi*. 2. *de Judicio ſiſti*. 3. *de Rato*. By the firſt the Suitor engaged, if he loſt his cauſe, to pay whatever ſum he ſhould be condemned in, by the Judge: By the ſecond, he gave ſecurity to continue in court, and abide the Sentence: The third was peculiar to a Proctor or Defenſor; by which it was engaged, that the Principal ſhould confirm whatever ſuch Proctor or Defenſor ſhould do in his name.

7. Cautions, with reſpect to the manner in which they were taken, were of four kinds. 1. *Cautio Fidejuſſoria*. 2. *Pignoratitia*. 3. *Juratoria*. 4. *Nude Promiſſoria*. Of theſe the firſt was generally in uſe, and called, by way of eminence, SATISDATIO.

8. By the old Law, neither the Actor nor his Proctor, when there was no doubt concerning his Mandate, gave Caution at all. In Real Actions, the *Reus* gave the Caution *Judicatum ſolvi*; and the ſame Security was required from his Proctor: But in Perſonal Actions, the *Reus*, who defended the ſuit in his own name, was excuſed. A Defenſor of the *Reus* not only gave the Caution *Judicatum ſolvi*, but that *de Rato* beſides.

9. By the new Law, an Actor gave Caution to conteſt the Suit, within two months after porrecting his Libel; and, if he loſt his cauſe, to pay a Tenth of the Sum, charged in that Libel, by way of Coſts. A *Reus*, whether convened in a Real or Perſonal Action, gave the Caution *Judicio ſiſti*.

10. The

† See Book II. Ch. 18. pr. 16—19.

10. The Proctor of an Actor, when his Mandate was doubtful, gave the Caution *de Rato*. The Proctor of a *Reus*, when the *Reus* himſelf was preſent, gave no Caution: When the *Reus* was abſent, he gave the Caution *Judicatum ſolvi*.

11. The Practice of the Courts of Common law in England, in demanding from the PLAINTIFF nominal PLEDGES OF PROSECUTION, and from the DEFENDANT what is called COMMON and SPECIAL BAIL, is not unlike the *Satiſdations*, required from an Actor and *Reus* by the Roman laws.

CHAP. IV.

Of Actions PERPETUAL *and* TEMPORARY.

Inſt. Lib. IV. Tit. 12.
Hoppii *Comm.* Lib. IV. Tit. 12.
Heinecc. *A. R.* } Lib. IV.
——— *El. J. C.* } Tit. 12.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 11.
Wood's *Inſt. of Laws of England.* B. IV. Ch. 4.
Blackſtone's *Comm.* B. III. Ch. 20.

1. NO certain Time was aſſigned by the ancient Roman law, within which Actions might be brought; but all were PERPETUAL, in the proper ſenſe of that word. Afterwards, thoſe Actions only were called Perpetual, which did not expire till after *thirty* years; and others, limited to a ſhorter time, were denominated TEMPORARY.

2. Real Actions, whether Civil or Prætorian, continued as long as the *Jus in Re*, from whence ſuch Actions aroſe; or elſe were Perpetual, and laſted 30 years. Perſonal Actions, Civil and Prætorian, whether ariſing from Contracts or Offences; as alſo the

Actions denominated Mixt; were, generally, Perpetual.

3. Penal Actions, when Civil, were Perpetual; when Prætorian, were Annual: but with ſome exceptions, in both caſes.

4. In Criminal Proſecutions, the right of Accuſing was, ordinarily, limited to 20 years.

5. By the Common law of England, all Actions are Perpetual; no certain Time being aſſigned, beyond which they may not be brought. But a preciſe Time hath been fixed by ſeveral Acts of Parliament, called the *Statutes of Limitation*; which may be pleaded by the Defendant *in bar* of the Plaintiff's demand.

6. Actions, like other Rights, deſcended, in many caſes, to a Man's Heirs. This might be 1. Actively, when granted *to* the Heirs of the Actor. 2. Paſſively, when allowed *againſt* the Heirs of the *Reus*.

7. Real Actions, and ſuch as were Perſecutory of the Thing, whether ariſing from Contracts or Offences, were granted, actively and paſſively, *to* Heirs and *againſt* them. Penal Actions were granted *to* Heirs, but not *againſt* them; unleſs ſuit had been conteſted during the life of the *Reus*.

8. If the Actor, before ſentence paſt, could any way be ſatisfied, the *Reus* was abſolved.

9. By the law of England, the Death of either of the litigant parties is an Abatement of the Suit. Perſonal Actions, ariſing *ex Contractu*, may be revived by and againſt Executors: thoſe ariſing *ex Delicto* die with the perſon, and can never be revived.

CHAP.

CHAP. V.

Of EXCEPTIONS *and* REPLICATIONS.

Inſt. Lib. IV. Tit. 13. 14.
Hoppii *Comm.* Lib. IV. Tit. 13. 14.
Heinecc. *A. R.* } Lib. IV. Tit.
——— *El. J. C.* } 13. 14.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 3.
Wood's *Inſt. of Laws of England.* B. IV. Ch. 4.
Blackſtone's *Comm.* B. III. Ch. 20.

1. AN Action, brought by the Actor, might be ſtopt or ſtayed, by oppoſing to it, on the part of the REUS, what was called an EXCEPTION.

2. An Exception might be oppoſed two ways. 1. by *denying* the cauſe of complaint; either ſimply, or with the allegation of new matter: by which the Action was excluded *ipſo jure*. 2. by *confeſſing* the Action to be juſt, according to ſtrict right, but eluding the force of it, from a principle of Equity. The former ſort were called Exceptions to the Fact; the latter, Exceptions to the Action.

3. Exceptions, with regard to their Origin, were 1. Civil. 2. Prætorian. With regard to their Effects, they were 1. Perpetual. 2. Temporary.

4. Perpetual (otherwiſe denominated Peremptory) Exceptions were thoſe, which totally repelled and extinguiſhed the Actions, to which they were oppoſed.

5. Perpetual Exceptions were ſometimes ſo called, with reſpect to Time: in which ſenſe all Exceptions were, regularly, perpetual; though the Actions, to which they were oppoſed, were Temporary.

6. Temporary (otherwiſe denominated Dilatory) Exceptions were thoſe, which delayed and barred an Action for a Time.

7. When the *Reus* had made his Exception, the Actor might oppoſe it by what was called a REPLICATION. The anſwer of the *Reus* to a Replication was called a DUPLICATION. The anſwer of the Actor to a Duplication was called a TRIPLICATION: and if the *Reus* had any thing further to oppoſe to this, it was called a QUADRUPLICATION.

8. In the laws of England, the ſeveral altercations between the Plaintiff and Defendant are denominated PLEADINGS. Of theſe the firſt is the DECLARATION, made by the Plaintiff, ſetting forth his cauſe of complaint: To which are oppoſed, on the part of the Defendant, 1. a DEFENCE, or denial of the complaint. 2. an Excuſe, or PLEA.

9. Pleas are 1. Dilatory, which tend to delay or put off the Suit. 2. Pleas to the Action, which go to the merits of the complaint.

10. Dilatory Pleas are 1. to the Juriſdiction. 2. to the Diſability of the Plaintiff. 3. in Abatement.

11. Pleas to the Action are 1. General, denying at once the whole Declaration; and called the General Iſſue. 2. Special, advancing ſome new fact, not mentioned in the Declaration, in bar of the Plaintiff's demand.

12. When the Defendant has made his Plea, the Plaintiff may oppoſe it by what is called a REPLICATION. The anſwer of the Defendant to a Replication is called a REJOINDER. The anſwer of the Plaintiff to a Rejoinder is called a SUR-REJOINDER. The Anſwer, made by the Defendant, to a Sur-rejoinder, is called a REBUTTER: and if the Plaintiff has any thing further to oppoſe to this, it is called a SUR-REBUTTER.

CHAP.

CHAP. VI.

Of INTERDICTS.

Inſt. Lib. IV. Tit. 15.
Hoppii *Comm.* Lib. IV. Tit. 15.
Heinecc. *A. R.* } Lib. IV.
——— *El. J. C.* } Tit. 15.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 3.
Wood's *Inſt. of Laws of England.* B. IV. Ch. 4.
Blackſtone's *Comm.* B. III. Ch. 10. 27.

1. INTERDICTS were ſo called, becauſe interpoſed, in the nature of an Interlocutory Decree, between two parties contending for Poſſeſſion, till the Property could be tried.

2. Interdicts, by the old Roman law, were Precepts, iſſued by the Prætor, in a certain form of words; by which he ordered or forbad ſomething to be done, in a cauſe concerning Poſſeſſion or *Quaſi*-Poſſeſſion.

3. Interdicts, by the later law, were Extraordinary Actions, by which the Poſſeſſion or *Quaſi*-Poſſeſſion of a Thing in diſpute was ſummarily decided.

4. Poſſeſſion was 1. Natural. 2. Civil.

5. Interdicts were 1. Prohibitory; which prohibited ſomething from being done. 2. Reſtoratory; which commanded ſomething to be reſtored. 3. Exhibitory; which commanded ſome Thing or Perſon to be exhibited.

6. Interdicts were granted, in order that Poſſeſſion might be 1. Gained. 2. Retained. 3. Recovered.

7. Interdicts for the purpoſe of *gaining* Poſſeſſion were 1. *Quorum Bonorum*; when goods belonging to an inheritance were unlawfully withheld from the *Bonorum Poſſeſſor*. 2. *Quod Legatorum*; when a Legacy had been ſeized by the Legatee, without conſent

of the Heir. 3. *Salvianum*; when goods had been obligated by the Hirer of a Rural Eſtate, as a ſecurity to the Letter for payment of Rent.

8. Interdicts for the purpoſe of *retaining* Poſſeſſion were 1. *Uti Poſſidetis*; granted to him, who at the time of conteſting ſuit was in poſſeſſion of an Immoveable, in order that he might be declared the legal Poſſeſſor. 2. *Utrubi*; granted for the like purpoſe to him, who at the time of conteſting ſuit was in poſſeſſion of a Moveable.

9. The Interdict for the purpoſe of *recovering* Poſſeſſion was called *Unde Vi*; granted to him, who had been ejected from the poſſeſſion of an Immoveable by force.

10. Interdicts were 1. Single; in which each of the litigant parties ſuſtained one character, either of Actor or *Reus*. 2. Double; in which each of the litigant parties ſuſtained two characters, both of Actor and *Reus*.

11. INJUNCTIONS in England, iſſued from the Courts of Chancery and Exchequer, to ſtop Proceedings at Law, to ſtay Waſte, or to quiet Poſſeſſeſſion of Lands; and the ACTIONS called POSSESSORY; partake of the nature of Interdicts according to the Roman law.

CHAP.

CHAP. VII.

Of the Methods, by which the TEMERITY *of* LITIGANTS *was reſtrained.*

Inſt. Lib. IV. Tit. 16.
Hoppii *Comm.* Lib. IV. Tit. 16.
Heinecc, *A. R.* } Lib. IV.
———*El. J. C.* } Tit. 16.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 1.
Burn's *Eccl. Law.* Titles, *Advocate, Oaths.*

1. THE Temerity of Litigants was reſtrained 1. by the OATH OF CALUMNY. 2. by a PECUNIARY MULCT. 3. by the fear of LEGAL INFAMY.

2. The OATH OF CALUMNY was 1. General: taken, at the beginning of the ſuit, by the Actor, *Reus*, and their reſpective Advocates; who ſeverally ſwore, they believed their cauſe to be juſt. 2. Special; otherwiſe called the OATH OF MALICE: demandable at any time during the ſuit, on ſuſpicion of Malice in the party from whom required.

3. The Oath of Calumny was formerly taken in England, in cauſes Civil and Eccleſiaſtical; and may yet be required in the Courts, which are governed by the Civil and Canon Laws.*

4. An Actor, if unable to make good his charge, was puniſhed by a PECUNIARY MULCT; which, before the age of Juſtinian, was a Tenth of the ſum, demanded in his Libel. But, by a Conſtitution of that Emperor, the party, who either proſecuted or defended a cauſe without juſt grounds, was condemned to pay the Coſts of Suit.

5. IN-

* It is actually required in the Univerſity Courts at Cambridge. See Appendix, No. IV.

5. INFAMY is the loſs of Reputation: and aroſe 1. from Fact; in the opinion of good men. 2. from Law; *ipſo jure*, or by the ſentence of the Judge.

6. Legal Infamy was incurred, whenever a perſon was condemned on account of ſome Offence or Fraud; or in an Action ariſing from any of the four Contracts called *Depoſitum*, *Societas*, *Mandatum*, *Tutela*.

CHAP. VIII.

Of the OFFICE *of a* JUDGE.

Inſt. Lib. IV. Tit. 17.
Hoppii *Comm.* Lib. IV. Tit. 17.
Heinecc. *A. R.* Lib. IV. Tit. 6. pr. § 1—6. 9. 10. 39—41. Tit. 17. pr. § 1—4.
———*El. J. C.* Lib. IV. Tit. 17.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 1. 3.
Eſprit des Loix. Liv. VI. Ch. 3. 4. Liv. XI. Ch. 18.
Cowell, *Inſtitutiones Juris Anglicani.* Lib. IV. Tit. 17.
Wood's *Inſt. of Laws of England.* B. IV. Ch. 3. 4.
Blackſtone's *Comm.* B. I. Ch. 7. B. II. Ch. 12. 20. B. III. Ch. 1. 4. 21. 23.

1. A JUDGE is a perſon appointed by authority to hear and determine Cauſes, Civil and Criminal.

2. The power of Judging Civil Cauſes, among the Romans, belonged at firſt to the Kings; and, after their expulſion, to the Conſuls: The perſons, on whom it next devolved, were the Prætor, at Rome, and the Proconſuls and *Præſides*, in the Provinces.

I.

3. During the Roman Republic, the Offices of MAGISTRATE and JUDGE were diſtinct and ſeparate. A Magiſtrate was appointed *cum Jurisdictione et*

et Imperio; to a Judge belonged only *nuda Notio, ſine Juriſdictione et Imperio.*

4. Juriſdiction is the power of hearing and determining Cauſes, and of doing Juſtice in matters of complaint. It is divided into 1. Voluntary and Contentious. 2. Civil and Criminal. 3. Ordinary and Extraordinary. 4. Proper and Delegated.

5. *Imperium* is 1. *Merum*, the ſimple Power of Puniſhment. 2. *Mixtum*, the Power of Puniſhment, with ſome degree of Juriſdiction.

6. *Notio* is the power of hearing Cauſes, and of pronouncing Sentence, without any degree of Juriſdiction.

7. The Office of the Magiſtrate was to enquire into matters of LAW; and whatever buſineſs was tranſacted before him, was ſaid to be done *in Jure.* The Office of the Judge was to enquire into matters of FACT; and whatever was tranſacted before him, was ſaid to be done *in Judicio.* When the Magiſtrate took cognizance both of the Law and the Fact, he was ſaid to adminiſter juſtice *extra ordinem*; and the Judgment, ſo adminiſtered, was called EXTRAORDINARY.

8. The Magiſtrate, when he decided on matters of Law, was aſſiſted by a council of Ten, called *Decemviri litibus judicandis.* To theſe was added, in important caſes, another council of 105 perſons, ſelected from each Tribe; whoſe Judgment was final, and called *Judicium Centumvirale.*

9. In England, different Tribunals are appointed for determining ISSUES of LAW and of FACT. An Iſſue on matter of Law is called a DEMURRER, and is tried by the Judges of the Court, before whom the Action is brought: An Iſſue on matter of Fact is determined by other methods, of which the principal is the Trial by Jury.

10. When the litigant parties had agreed on a proper perſon to examine the Fact, the Prætor was applied to, by the Actor, to appoint him: And the perſon, ſo appointed, was called *Judex Datus ſive Pedaneus.*

11. A

11. A JUDGE had properly the cognizance of Actions, that were *Stricti Juris:* in actions *Bonæ Fidei*, or of the Arbitrary kind, the perſon appointed was called ARBITER. When the Action was laid for the recovery of ſome certain Thing, demanded by the Actor, the perſons, given by the Prætor, were called RECUPERATORES.

12. The Judge, given by the Prætor, might be rejected by either of the litigants, who diſapproved the appointment: in like manner as JURORS in England may be *challenged*, by either party, as they appear, when called, to be ſworn.

13. The cauſe being fully heard, the Judge pronounced SENTENCE; the EXECUTION of which was committed to Officers, appointed for the purpoſe.

14. In cauſes *Bonæ Fidei*, and ſuch as were Arbitrary, the parties ſometimes agreed to ſubmit the matter in diſpute to a third perſon; in which caſe, a Depoſit of money was generally made, to be forfeited by him, who refuſed to ſtand by ſuch perſon's Sentence. This mode of ending a Suit is called, in the Roman law, COMPROMISSUM, and, in the law of England, ARBITRATION; and the deciſion of the Arbitrators, or of the Umpire, is called an AWARD. When the litigant parties agreed upon a ſatisfaction among themſelves, without referring it to Arbitration, it was called, in the Roman law, TRANSACTION; and, in the law of England, it is called an ACCORD.

II.

15. After the decline of the Roman Republic, the Offices of Magiſtrate and Judge were united: by which means all Judgments became Extraordinary, and the diſtinction of what was done *in Jure* and *in Judicio* was aboliſhed.*

* In general it may be obſerved, that in the Inſtitutions, the Code and the Novels, *Judex* and *Magiſtratus* denote the ſame perſon: And in the Pandects or Digeſts, whenever the word *Judex* is mentioned alone, *Judex Pedaneus* is to be underſtood.

16. The Office of a Judge, regarded as a Magiſtrate, was 1. *Merum ſive Nobile.* 2. *Promotum ſive Mercenarium.*

17. To the exerciſe of the Judicial Office were required 1. *Cauſæ Cognitio*; or an enquiry into the Truth and Juſtice of the matter in controverſy. 2. *Judicatio*, or the pronouncing of Sentence.

18. In Real Actions, when Sentence was given againſt the Actor, or demandant, the *Reus*, or perſon in poſſeſſion, was diſcharged: When Sentence was given againſt the Reus, he was obliged to reſtore not only the Thing itſelf, but all its Fruits and Produce.

19. In Actions *ad exhibendum*, the *Reus*, if condemned, was bound not only to exhibit the Thing itſelf, but alſo to exhibit it in the ſame ſtate it was, when firſt the Exhibition was demanded.

20. In the Actions called *Judicia Diviſoria*, (viz. *Familiæ Erciſcundæ*, *Communi Dividundo*, *Finium Regundorum*) each of the claimants was to have his reſpective part; or, if that could not be done, he, who had the advantage, was ordered to render an equivalent in money.

21. In England, the partition of an Inheritance may be by Conſent of the Coheirs; or by Law, in conſequence of the writ *de Partitione facienda*. In determining the boundaries of contiguous Lordſhips, the writs *de Perambulatione facienda* and *de Rationabilibus diviſis* are of the ſame uſe as the *Judicium Finium Regundorum* in the Roman law.

22. A Judge, in England, is a chief Magiſtrate, appointed by the Crown, to try Cauſes, Civil and Criminal, and to do what to Juſtice appertains, according to the Law and Cuſtom of the Land.

CHAP.

CHAP. IX.

Of the FORM *of* PRIVATE JUDGMENTS, *or the courſe of proceeding in* CIVIL CAUSES, *according to the Roman Law.*

Hoppii *Comm.* Lib. IV. Tit. 6. § 11.
Heinecc. *A. R.* Lib. III. Tit. 21. § 2, 3. 4. Lib. IV. Tit. 6. § 7. 8. 11—22. 42. 43. Tit. 17. § 5—13.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 1. 2. 3.
Wood's *Inſt. of Laws of England.* B. IV. Ch. 4.
Burn's *Eccl. Law.* Titles, *Notary Public, Oaths.*
Blackſtone's *Comm.* B. III. Ch. 3. 18. 19. 20. 22. 23. 24. 25. 26.

1. JUDICIUM, or Trial, is a legal debate, on a matter of controverſy, before a competent Judge.

2. JUDGMENTS, in the Roman law, were 1. Private. 2. Public.

3. PRIVATE JUDGMENTS were thoſe, which related to Civil Cauſes, in order to redreſs an Injury, as it affected an Individual; and were proſecuted by Action, which could only be inſtituted by the injured party.

4. A Court is a place, where Juſtice is judicially adminiſtered. This place, among the Romans, was 1. Superior. 2. Plane. In the former, the Prætor adminiſtered Juſtice *pro Tribunali*: in the latter, he was ſaid *de Plano cognoſcere.*

5. To a Court three perſons at leaſt are neceſſary, ACTOR, REUS, JUDEX. To whom may be added 1. Advocates or Counſel. 2. Proctors. 3. Notaries. 4. Apparitors or Bedels; called *Viatores* and *Executores litium.*

6. The Roman Prætor was not allowed to hear cauſes, but on certain DAYS. Days were 1. *Faſti.* 2. *Nefaſti.* 3. *Interciſi.* Of theſe the firſt were properly

perly Judicial, and were called *Dies Seſſionum*, *Dies Legitimi*, or Term-days.

7. The conſtituent parts of a Civil Cauſe, according to the form of PRIVATE JUDGMENTS, were, in order, theſe. I. VOCATIO IN JUS. II. POSTULATIO *et* EDITIO ACTIONIS. III. VADIMONIUM. IV. INTENTIO LITIS *ſive* ACTIONIS. V. EXCEPTIO *Rei*. VI. DATIO JUDICIS. VII. SATISDATIONES *Actoris et Rei*. VIII. CONTESTATIO LITIS. IX. OATHS of the JUDGE and LITIGANTS. X. PROOFS. XI. DISCEPTATIO CAUSÆ. XII. SENTENCE. XIII. EXECUTION. XIV. APPEAL.

8. I. VOCATIO IN JUS was a perſonal Citation of the *Reus*, or offending party, by which he was commanded to appear before the Magiſtrate, or Prætor, in order to enter into ſuit.

9. Perſonal Citation, by the law of the 12 Tables, might be by private authority, and with force; but could not be executed upon a man, within his own Houſe or Walls. The ſame protection againſt an Arreſt is afforded to a Defendant, in England. If the *Reus* abſconded, ſo that the Citation was of no effect, the Actor was ſent into the Poſſeſſion of his Goods.

10. In England, the beginning or foundation of a Civil Suit, in the Court of COMMON PLEAS, is the Writ, called an ORIGINAL; which is 1. Optional. 2. Peremptory. The means of compelling compliance with this Writ is called the PROCESS: which is effected 1. by a Verbal Monition, or Summons. 2. by Writ of Attachment, or *Pone*. 3. by Writ of *Diſtringas*, or taking the Goods and Lands of the Defendant. To which are ſubſequent the Writs of *Capias ad Reſpondendum*, and *Teſtatum Capias*: Or, inſtead of theſe, in the KING'S BENCH, the *Bill of Middleſex*, and the Writ of *Latitat*; or, in the EXCHEQUER, the Writ of *Quo Minus*.

11. If the *Reus* could find Sureties, who offered to defend his perſon (which Sureties were called *Vindices*); or the parties could make up the matter by Tranſ-

Tranſaction, while they were *in the way* to the Magiſtrate; the *Reus* was diſmiſſed. In England, a Defendant, before he makes his Plea, may demand an IMPARLANCE with the Plaintiff, to ſee if the matter may not be ended without further ſuit.

12. II. POSTULATIO ACTIONIS was the Actor's aſking of leave to inſtitute his Action, on appearance of the parties before the Prætor.

13. EDITIO ACTIONIS was the publiſhing of the Action by the Actor in the preſence of the *Reus*, after leave aſked and obtained of the Prætor.

14. III. VADIMONIUM *Conceptum* was the Actor's obliging of the *Reus* to give Sureties for his appearance before the Prætor, on a day appointed. Such Sureties were called *Vades*.

15. The day appointed was generally the third day after the preſent, called *dies perendinus:* But ſometimes a longer interval was allowed by the Prætor.

16. On Default of either party on the day appointed, the Defaulter loſt his cauſe.

17. In England, a day is always given for the parties to appear in Court, in perſon or by their Attornies, from one adjournment to another: which giving of a day is called the CONTINUANCE. In caſe of omiſſion or neglect by the Plaintiff, he loſes the benefit of his Writ, and is ſaid to be *nonſuit*ed, or *non-pros*'d; When the omiſſion or neglect is on the part of the Defendant, Judgment may go againſt him for ſuch Default.

18. IV. INTENTIO LITIS *ſive* ACTIONIS was the preferring of the Suit or Action, in a certain form of words, by the Actor; on his own appearance, and that of the *Reus*, before the Prætor.

19. To this ſucceeded V. EXCEPTIO *Rei*; or the Exception made to the Action, by the *Reus*. VI. DATIO JUDICIS; or the appointment of a Judge, by the Prætor, to try the Fact; who at the ſame time defined the number of Witneſſes, by whom the Fact ſhould be proved. VII. SATISDATIONES *Actoris et Rei*;

Rei; or the Cautions and Securities given by each of the Litigants: all already explained.*

20. VIII. CONTESTATIO LITIS anſwers to what in the law of England is called JOINING ISSUE; being a narration of the controverſy, made by each party, before the Judge, in the preſence of Witneſſes: by which the matter in diſpute was brought to a Trial, and in a way of being determined, in favour of the Actor or the *Reus*.

21. Whatever preceded the Conteſtation of Suit, was tranſacted before the Prætor, and ſaid to be done *in Jure:* whatever was ſubſequent to it, was tranſacted before the Judge, and ſaid to be done in *Judicio*.

22. IX. The OATH of the JUDGE was, that he would decide on the merits of the cauſe, *ex animi ſententia:* That, taken by the LITIGANTS, was the Oath of CALUMNY.†

23. If on the day appointed for Trial the Judge were hindered from attending, *dies diffindebatur*, or the day was deferred: If either of the Litigants were abſent, he was cited by one or more Edicts; after which if he did not appear, the Cauſe was heard, and Sentence given, as if he had been preſent.

24. X. PROOFS are derived from Facts; and were always firſt required from the ſide, which *affirmed* the matter in queſtion.

25. Proof (*Probatio*) was 1. *Plena*; by two Witneſſes, or a Public Inſtrument. 2. *Semi-plena*; by one Witneſs, or a Private Inſtrument. Two Half Proofs, joined together, made a Full Proof.

26. Proofs might be had from (1) Confeſſion. (2) Preſumptions. (3) Witneſſes. (4) Inſtruments. (5) Oaths.

27. (1) Confeſſion is an acknowledgment by the adverſe party, that the Debt or Allegation, with which he is charged, is true.

28. (2) Preſumptions are conjectural concluſions from

* See Chapters 3d, 5th, and 8th of this Book.

† See Chapter 7th of this Book.

from probable arguments: And are 1. of Law. 2. of Man.

29. (3) Witneſſes are perſons called upon to declare in Court what they know of the Fact under examination.

30. To make *full* proof, Two Witneſſes were neceſſary; and where One only was to be had, the party Himſelf was ſometimes examined in his own behalf. In England, One Witneſs is ſufficient to teſtify to a ſingle Fact: nor can any one be Witneſs in his own cauſe.

31. The examination of Witneſſes was formerly in public, and *viva voce:* But, according to the modern practice of the Courts of Civil Law, it is now in private; Interrogatories being previouſly ſettled for the purpoſe.

32. Unwilling Witneſſes might be *compelled* to declare their Teſtimony: In England, they may be brought in by a Writ of *Subpœna ad Teſtificandum.*

33. Trial by Witneſſes, without the intervention of a Jury, is in one inſtance permitted by the law of England; on a Writ of Dower brought by a Wife, when the death of the Huſband is in Iſſue.

34. (4) Inſtruments or Writings were 1. Public; which proved themſelves. 2. Private; which, unleſs very ancient, were to be proved by Witneſſes.

35. In England, Records, and Deeds of 30 years, prove themſelves. Modern Deeds, and other Writings, muſt be proved by Witneſſes. But Books of Account are not allowed to be given in evidence for the Owner; as in the Civil law.

36. (5) Oaths are 1. Promiſſory. 2. Deciſive.

37. The Deciſive Oath is 1. Voluntary. 2. Judicial. 3. Neceſſary. The Neceſſary Oath is (1) Purgatory. (2) Suppletory.*

38. To

* See the caſe of *Williams* and Lady *Bridget Oſborne*, in *Burn's* Eccleſiaſtical Law, Title, *Oaths*. *Williams* was admitted, by the Dean of the Arches, to his Suppletory Oath, in order to prove his Marriage with Lady *Bridget:* upon which the Lady appealed to the Delegates; by whom the Marriage was confirmed.

38. To the Deciſive Judicial Oath, in uſe among the Romans, that ſpecies of Trial in England, which is called WAGER OF LAW, is ſomewhat ſimilar: by which, in an Action of Debt upon Simple Contract, a Defendant, who will ſwear himſelf not chargeable, and who appears to be a perſon of credit, ſhall be acquitted of his Debt.

39. XI. DISCEPTATIO CAUSÆ was the diſputing of the Cauſe by the *Patroni*, or Advocates, on both ſides. This conſiſted of two parts. 1. *Conjectio Cauſæ.* 2. *Peroratio.*

40. XII. SENTENCE is 1. Interlocutory, on ſome incident queſtion, ariſing from the principal cauſe. 2. Definitive, (otherwiſe called Final) by which the principal cauſe is determined.

41. Sentence, in the law of England, is called the JUDGMENT; which cannot be *entered* till the next Term after Trial had, and upon notice to the vanquiſhed party.

42. To a Sentence Coſts are a neceſſary appendage, both in the Roman and Engliſh laws.

43. XIII. EXECUTION is the putting in force the Sentence of the Judge.

44. By the old Roman law, if the party, who was caſt, did not obey the Sentence within 30 days, he was aſſigned over to the Actor; who might commit him to priſon, till ſatisfaction was made: This was called *Addictio.* But the general way was for the Prætor to cauſe Execution to be done by Lictors; who obliged all to make the ſatisfaction required, in Damages, or by giving Pledges.

45. By the laws of England, Execution, in Actions Real or Mixt, is effected by Writ of *Habere facias Seiſinam*, or *Poſſeſſionem.* In other Actions, where the Judgment is, that ſomething Special be done by the Defendant, a Special Writ of Execution is iſſued, according to the caſe. Where Money only is recovered, Executions are 1. againſt the Body of the Defendant; or againſt his Bail. 2. againſt his Goods.

3. againſt his Goods, and Profits of his Lands. 4. againſt his Goods, and Poſſeſſion of his Lands. 5. againſt his Body, Lands and Goods.

46. XIV. APPEAL is the removing of a cauſe from an Inferior to the next Superior Court; an INHIBITION being iſſued to the inferior Judge to ſtop proceedings, while the Appeal is depending.

47. An Appeal might be made immediately, *apud acta*; or within ten days after Sentence paſſed, by Libel. After two Appeals in the ſame cauſe, a *third* was not allowed.

48. SUPPLICATION is a complaint, brought within two years againſt a Sentence; where the perſon, againſt whom the Sentence was pronounced, neglected to appeal in time.

49. RESTITUTIO IN INTEGRUM was, when a cauſe, on petition of the party who was caſt, was reduced by the Prætor to its firſt ſtate; after which, the Suit might come on again, and have a ſecond hearing.

50. A REVIEW is a petition to the ſame Judge to rehear the cauſe, and rectify the Sentence, if there be occaſion.

51. In England, after Judgment given, Execution may be ſtaid by ſeveral Writs, in the nature of Appeals: of which the Principal are 1. a Writ of Attaint. 2. A Writ of *Audita Querela*. 3. A Writ of Error.

CHAP.

CHAP. X.

Of the COURTS IN ENGLAND, *in which the* CIVIL LAW *is permitted to be uſed.*

Wood's *Inſt. of Laws of England.* B. IV. Ch. 1. 2.
Grey's *Eccleſiaſtical Law.* Title 22. 24. 32. 42—46.
Oughtoni *Ordo Judiciorum.* Tit. 137. 157—192. 193—217. 218—258. 259—268.
Burn's *Eccl. Law.* Titles, *Advowſon, Appeal, Archdeacon, Arches. Benefice. Chancellor, Colleges, Commiſſary, Conſiſtory, Conſultation, Courts. Defamation, Degradation, Delegates, Deprivation, Dilapidations, Double Quarrel. Excommunication. Faculty Court. Marriage. Peculiar, Penance, Prerogative Court, Prohibition. Sequeſtration, Spoliation, Suſpenſion. Tithes. Viſitation. Wills.*
Blackſtone's *Comm.* Introduction. Sect. 1. 3. B. I. Ch. 2. 18. B. II. Ch. 3. art. 2. Ch. 20. B. III. Ch. 3. 5. 6. 7. 16. 22. art. 3. B. IV. Ch. 19.

1. THERE are Four Courts in England, in which the CIVIL LAW is permitted, under different reſtrictions, to be uſed. Theſe are I. The Court MILITARY, or Court of Honour. II. The Courts MARITIME. III. Courts Chriſtian, or ECCLESIASTICAL Courts. IV. The Courts of the TWO UNIVERSITIES.

2. I. The Court MILITARY, or Court of Honour, in great vogue in the ages of Chivalry, is now almoſt out of uſe. The Judges of this Court were the Lord High Conſtable and Earl Marſhal, jointly; but it is now held before the Earl Marſhal only: It is not a Court of Record.

3. Cauſes, cognizable in the Military Court, relate 1. to matters of Honour. 2. to matters of Heraldry and Coat-Armour. But no cauſe is cognizable here, that may be determined by the Common Law; nor can any pecuniary ſatisfaction be given to the party injured, in the way of Damages.

4. The Proceedings in this Court are conformed to the Civil law, and the Law of Arms: And from its Sentence an Appeal lies to the King in perſon.

5. II. The Courts MARITIME are 1. The Court of Admiralty; which is held before the Lord High Admiral; or his Deputy, who is called the Judge: And is not a Court of Record. 2. Its Courts of Appeal.

6. Cauſes, cognizable in the Courts Maritime, are thoſe ariſing on the Sea; but not partly on the Sea, and partly on the Land; nor within the body of any County.

7. The proceedings in this Court are much conformed to the Civil law, in conjunction with Marine cuſtoms: But in Criminal caſes, Offences are tried by Commiſſioners, the Judge of the Admiralty preſiding; and the Law of England is followed, as if the Offences had been committed on Land.

8. The Courts of Appeal, belonging to the Courts of Admiralty, are 1. The King in Chancery, or the Court of Delegates. 2. In caſe of Prizes taken at Sea, certain Commiſſioners of Appeals; conſiſting, chiefly, of the Lords of the Privy Council.

9. III. The ſeparation of the Eccleſiaſtical from the Temporal Courts was no where known, till after the Emperors became Chriſtian; nor in England, till after the Norman Conqueſt.

10. ECCLESIASTICAL Courts ars 1. Courts of VOLUNTARY; 2. Courts of CONTENTIOUS Juriſdiction.

11. Of Courts of VOLUNTARY Juriſdiction, the chief is the FACULTY Court, belonging to the Archbiſhop of Canterbury: the Judge of which is called MASTER or Commiſſary OF THE FACULTIES.

12. Courts of CONTENTIOUS Juriſdiction are 1. the Court of the ARCHDEACON: the Judge of which, where he does not preſide himſelf, is called the OFFICIAL. 2. the CONSISTORY Court of every Biſhop in

in his Dioceſe: the Judge of which is (1) the Biſhop's CHANCELLOR; or (2) his COMMISSARY. 3. the Court of ARCHES, belonging to the Archbiſhop: the Judge of which is called the DEAN OF THE ARCHES. 4. the Court of PECULIARS; having Juriſdiction over all ſuch Pariſhes in the Province of Canterbury, which are ſubject to the Metropolitan only. 5. the PREROGATIVE Court, for the Trial of Teſtamentary Cauſes, where the party dying hath left *bona notabilia* in two different Dioceſes: the Judge of which is called the JUDGE OF THE PREROGATIVE. 6. the Court of DELEGATES, or the great Court of Appeal in all Eccleſiaſtical Cauſes. The Sentence of this Court is Definitive; but may be reviſed, with leave from the Crown, by a COMMISSION OF REVIEW.

13. The Courts of Eccleſiaſtical Juriſdiction are, none of them, Courts of Record.

14. Cauſes, cognizable in Eccleſiaſtical Courts, are 1. Beneficial. 2. Matrimonial. 3. Teſtamentary. 4. Criminal.*

15. Beneficial Cauſes are 1. *Duplex Querela.* 2. *Jus Patronatus.* 3. Spoliation. 4. Dilapidations. 5. Non-payment of Eccleſiaſtical Dues. 6. Subtraction of Tithes. Tithes are (1) Predial. (2) Perſonal. (3) Mixt: which are due of common right to the Parſon or Vicar; unleſs diſcharged (1) by Real Compoſition. (2) by Preſcription.

16. Matrimonial Cauſes are 1. Jactitation of Marriage. 2. Contract of Marriage, and Eſpouſals: (taken away by 26 Geo. II.) 3. Reſtitution of Conjugal Rights. 4. Divorces: (1) *a vinculo Matrimonii*, for a canonical cauſe exiſting *previous* to the Marriage; as Conſanguinity, Affinity, and Corporal Imbecillity: (2) *a menſa et thoro*, for a cauſe ariſing *after* Marriage; as Adultery, Cruelty, &c. 5. Alimony.

17. Teſtamentary Cauſes are 1. Probate of Wills. 2. Grant-

* Under Criminal Cauſes I include thoſe called Defamatory; which Oughton, in his *Ordo Judiciorum*, reckons as a fifth ſpecies of Eccleſiaſtical Cauſes, diſtinct from Criminal.

2. Granting of Adminiſtrations. 3. Subtraction of Legacies.

18. Criminal Cauſes are thoſe, which relate to Crimes of Eccleſiaſtical Cognizance: where the proceedings are *pro ſalute animæ et reformatione morum.*

19. The Puniſhment of Crimes of Eccleſiaſtical Cognizance belongs, of common right, to the Biſhops, and their Vicars General in Spirituals; and, by Conceſſions or Preſcription, to Archdeacons alſo: to both whom is committed, for this purpoſe, the power of VISITATION.

20. Eccleſiaſtical Puniſhments are 1. common to Clergy and Laity. 2. peculiar to the Clergy.

21. Eccleſiaſtical Puniſhments, common to Clergy and Laity, are 1. Monition. 2. Penance. 3. Excommunication; which is of two kinds, (1) the Greater. (2) the Leſs. Thoſe peculiar to the Clergy, are 1. Sequeſtration of the Profits of a Church. 2. Suſpenſion. 3. Deprivation. 4. Degradation.

22. APPEALS in Cauſes Eccleſiaſtical, which formerly, from the Reign of Stephen to that of Henry VIII, lay to the Pope or See of Rome, are now (by 24 and 25 Hen. VIII) directed to be in this form, and not otherwiſe: From the Archdeacon or his Official, to the Biſhop or Dioceſan: from the Biſhop, his Chancellor or Commiſſary, to the Archbiſhop of the Province: from the Court of Arches, Court of Peculiars, and the Prerogative Court, to the King in Chancery, or the Court of Delegates.

23. IV. The Univerſities of Oxford and Cambridge are Corporations, Lay and Civil, by Preſcription; whoſe Charters and Privileges have been confirmed by Parliament.

24. Of the Privileges belonging to the Univerſities the chief are 1. the Reſervation of a certain part of the Rent, ariſing from College Leaſes, in Proviſion-Corn. 3. the Printing of Bibles and books of Common Prayer; and (in the Univerſity of Cambridge) of Acts of Parliament, and Abridgments of Acts of Parliament;

liament *; in concurrence with the King's Printers. 3. the ſending two of their own body Burgeſſes to Parliament. 4. Preſentation to Benefices of Roman-Catholic Patrons. 5. the COURTS of the Chancellor of each Univerſity, or Vice-Chancellor; (which are alſo Courts of RECORD) in excluſion of the King's Courts of Common law.

25. Cauſes, cognizable in the Chancellors Courts of the two Univerſities, are all Civil Cauſes, excepting where the right of Freehold is concerned; and all Criminal Offences and Miſdemeſnors, under the degree of Treaſon, Felony, and Mayhem.

26. To conſtitute the excluſive right of Juriſdiction belonging to the Univerſities, one of the parties muſt be a Scholar or privileged perſon: in which caſe, the Chancellor or Vice-Chancellor may claim Cognizance of the Cauſe, by CERTIFICATE, without the intervention of a Jury.

27. Beſides the Chancellor's Courts, there is, in the Univerſity of Cambridge at leaſt, another, called the Court of the COMMISSARY: which hath cognizance in all Cauſes, Civil and Criminal, within the Univerſity; unleſs where a Maſter of Arts, or one of ſuperior degree, is a party.

28. The Courts of the Univerſities have power to puniſh for Contempt and Contumacy; to ſet a Fine, and to Impriſon the party till it be paid; and to inflict Eccleſiaſtical Cenſures, or ſuch as are appointed by the Statutes, for Offences that are merely Temporal.

29. The Trial of Treaſon, Felony and Mayhem, though prohibited in the Chancellors Courts, is by a par-

* This valuable privilege, of printing Acts of Parliament and Abridgments of Acts of Parliament, was ſolemnly confirmed to the Univerſity of Cambridge, by the unanimous Judgment of the Court of King's Bench, Nov. 24, 1758. See *Burn*'s Eccleſiaſtical Law, Title, *Colleges:* where the whole learning on this ſubject is exhauſted, in an incomparable argument, in behalf of the Univerſity, by the late Lord Chancellor YORKE, then Solicitor General.

particular Charter committed to the Courts of the HIGH STEWARD of either Univerſity: to whom, and to his Deputy, is alſo given the privilege of holding a COURT LEET.

30. From the Sentence of the Chancellor or Vice-chancellor, in the Univerſity of OXFORD, an APPEAL lies to Delegates, appointed by the Congregation: from thence to other Delegates, appointed by the Convocation: and if all three concur in the ſame Sentence, it is final.† In caſe of diſcordance in the Sentences, the Appeal lies, in the laſt reſort, to the King in Chancery, or to Judges Delegates, appointed under the Great Seal.

31. From the Sentence of the Chancellor or Vice-chancellor, in the Univerſity of CAMBRIDGE, an APPEAL lies to the Senate, or Body of the Univerſity; by whom the examination of the Cauſe is committed to Delegates, not leſs than three nor more than five; whoſe Sentence is final, and not liable to be reverſed by *Writ of Error* from the Courts of Common law. From the Sentence of the Commiſſary an Appeal lies to the Chancellor or Vice-chancellor; and from thence to Delegates, if the Cauſe require it.

32. The right of Appeal, allowed by the Statutes of the Univerſities, extends to ALL Cauſes, ‡ Criminal as well as Civil; in conformity to the Roman law.*

33. The

† This is agreeable to the Civil Law; according to which no Appeal was admitted after *three* Sentences conformable to each other. C. 7. 70. 1.

‡ See Appendix, N° II. III. for the Statutes of the Univerſity of Cambridge on this head.

* See D. 49. 1. 6. where the Right of Appeal in *Criminal* Cauſes is admitted in the Roman law, without reſtriction, from the common principle of Humanity. *Credo*, ſays Ulpian, *Humanitatis ratione*, OMNEM *Provocantem audiri debere*. And this, even though the perſon condemned wiſhed to decline the benefit of the Appeal, when made by another in his behalf. *Quid ergo ſi*

33. The four Courts now mentioned, in which the Civil law is permitted to be uſed, are all ſubordinate to the Courts of Common law; and in caſe of Encroachment of Juriſdiction, are liable to be reſtrained by PROHIBITION.

34. PROHIBITION is a Writ, iſſuing out of ſome of the Courts of Common law, forbidding the Judge and Parties of a Suit in an Inferior Court to proceed in the proſecution; *on ſuggeſtion* that the cauſe originally, or on account of ſome collateral matter, does not belong to that Juriſdiction.

35. Prohibition is ſometimes granted, on ſuggeſtion of matters not contained in the Libel of the party aggrieved: This is called a Prohibition *on collateral Surmiſes.*

36. When the matter ſuggeſted appears, in the judgment of the Superior Court, to be falſe, or not proved, a Writ of CONSULTATION is granted; by which the Cauſe is returned to the original Juriſdiction, and determined by the Court below.

ſi reſiſtat, qui damnatus eſt, adverſus Provocationem; nec velit admittere ejus Appellationem, perire feſtinans? ADHUC PUTEM DIFFERENDUM SUPPLICIUM.

CHAP.

CHAP. XI.

Of the Courſe of Proceeding in the ECCLESIASTICAL COURTS, *and* COURTS OF THE TWO UNIVERSITIES, *in England.*

Grey's *Eccleſiaſtical Law.* Title 44. 45.
Oughtoni *Ordo Judiciorum.* Tit. 7. 14. 19. 24. 48. 54—61. 72. 73. 75. 80. 85. 95. 97. 104. 105. 110. 111. 113—123. 127. 131. 137—139. 150—156. 269—272. 274. 276. 277. 285. 288—293. 295. 303. 304. 307. 319. 320. 329. 330. *Synopſis Praxeos in Curiis Eccleſiaſticis,* et *Ordo Judiciarius*; ad finem Tit. 14.
Burn's *Eccl. Law.* Titles, *Anſwer, Appeal. Citation. Evidence. Libel. Oaths.*
Blackſtone's *Comm.* B. III. Ch. 7.

1. CAUSES, which may be moved in the ECCLESIASTICAL COURTS, in England, are 1. Cauſes of OFFICE; which run in the name of the Judge. 2. of INSTANCE; at the ſolicitation of ſome party.

2. Cauſes of Office are 1. *ex Officio mero.* 2. *ex Officio promoto.* Cauſes of Inſtance are 1. Plenary. 2. Summary.

3. The conſtituent parts of an Eccleſiaſtical Cauſe, according to the uſual Courſe of Proceedings, are, in order, theſe. I. CITATION. II. LIBEL. III. CONTESTATION OF SUIT. IV. PERSONAL ANSWER OF THE DEFENDANT. V. ASSIGNMENT OF A TERM PROBATORY. VI. PROOFS. VII. DEFENSIVE ALLEGATION. VIII. TERM TO PROPOUND ALL THINGS. IX. TERM TO CONCLUDE. X. INFORMATIONS. XI. SENTENCE. XII. EXECUTION. XIII. APPEAL.

4. I. CITATION is a Judicial Act, by which the Defendant is ſummoned to appear, in a place where Juſtice is adminiſtered, in order to enter into Suit.

5. Every

5. Every Citation is returnable at a certain place and day. Such Return may be made 1. Perſonally, by oath of the party, who has executed the ſame. 2. by Certificate.

6. Beſides the Original or Primary Citation, there are others; called 1. *Decretum viis et modis.* 2. *Sub mutuæ.* 3. an Intimation.

7. II. A LIBEL (called in Common law a *Declaration*, and in Chancery a *Bill*) is a Charge, in writing, brought by the Plaintiff; to which the Defendant is obliged to anſwer.

8. The proceeding by Libel is peculiar to Cauſes of Inſtance: In Cauſes of Office, the proceeding is by ARTICLES.

9. III. CONTESTATION OF SUIT is a general anſwer, made by the Defendant; in which he denies the matter charged againſt him in the Libel.

10. IV. PERSONAL ANSWER OF THE DEFENDANT is what is urged in particular, by way of denial or extenuation of the charge; *before* the Plaintiff makes proof of his Libel by Witneſſes.

11. The Eccleſiaſtical Judge might formerly have *compelled* the parties to anſwer *upon Oath* to any matter objected againſt them, however criminal: But the power of adminiſtering ſuch oath (called the oath *ex officio*) is taken away, by the Statute of 13 Car. II. Nor is any perſon now obliged to *purge* himſelf, upon oath, of any crime, of which he is accuſed.

12. V. The ASSIGNMENT OF A TERM PROBATORY is an appointment by the Judge of a certain time, within which the Plaintiff is required to *prove* ſo much of the Libel, as the Defendant has not confeſſed in his Perſonal Anſwers.

13. VI. PROOFS are had 1. from Witneſſes. 2. from Inſtruments.

14. Witneſſes are examined in private, 1. to the Libel of the Plaintiff. 2. to Interrogatories, propoſed by the Defendant.

15. Unwilling Witneſſes may be brought in by a Citation,

Citation, called a *Compulſory:* But thoſe, who live at a diſtance, may be examined where they live, by virtue of a *Commiſſion.*

16. To make Proof, Two Witneſſes at leaſt are neceſſary.

17. Inſtruments are 1. Public. 2. Private. Which, if not confeſſed by the adverſe party, muſt always be proved by the perſon who produces them.

18. When the Term Probatory lapſes, before the Plaintiff has finiſhed his Proof, it may be continued for a longer time: unleſs the Judge, ſuſpecting the party to have been *in mora*, ſhall have aſſigned it *peremptorie.*

19. If new matter ariſes, not yet produced in evidence; it may be admitted under the name of an ALLEGATION.

20. The Plaintiff, having proved his Libel, demands what is called the PUBLICATION OF WITNESSES; which, if the Defendant offers any thing by way of Exception, it is fatal for him to ſee.

21. VII. DEFENSIVE ALLEGATION is what is oppoſed by the Defendant, in writing, to the charge objected in the Libel. To which are conſequent, as in the caſe of the Plaintiff, 1. the Perſonal Anſwer of the Plaintiff. 2. a Term Probatory. 3. Publication of Witneſſes.

22. VIII. THE TERM TO PROPOUND ALL THINGS is an appointment by the Judge of a time, at which both parties are to exhibit all the Acts and Inſtruments, which make for their reſpective Cauſes.

23. IX. The TERM TO CONCLUDE is an appointment by the Judge of a time, at which both parties are underſtood to renounce all further Exhibits and Allegations.

24. The Terms *to propound all things*, and *to conclude*, are peculiar to ſuch Cauſes as are Plenary: In Summary Cauſes, inſtead of them, the Term required is called the Term *to hear Sentence on the firſt Aſſignation.*

25. X.

25. X. INFORMATIONS are arguments urged before the Judge by the Advocates on both ſides, after the Pleadings and Proofs are concluded: Which are followed by XI. the SENTENCE; either Interlocutory or Definitive: and XII. EXECUTION.

26. XIII. Sometimes a Cauſe is removed from an Inferior to a Superior Court; by which all proceedings in the lower court are ſuſpended, till the reaſons of ſuch removal are heard.

27. A Cauſe may be removed from an Inferior to a Superior Court 1. *ante Litis Ingreſſum*, by PROVOCATION. 2. *poſt Litis Ingreſſum*, by RECUSATION. 3. by APPEAL.

28. PROVOCATION is, when one, who ſuſpects an Inferior Judge intends to proceed againſt him, in a Cauſe of Office or of Inſtance, puts himſelf, *before* he is cited, under the protection of a Superior Court.

29. RECUSATION is, when one, who ſuſpects an Inferior Judge of Partiality, refuſes, *after* he is cited, to ſubmit to his Juriſdiction: in which caſe, the perſon refuſing muſt exhibit Articles, to be referred to Arbitrators, named on both ſides.

30. APPEAL is 1. Judicial, or *apud acta*; which is made *viva voce*. 2. Extrajudicial, before a Notary; which is made *in ſcriptis*.

31. Appeals may be 1. from Grievances, before Sentence. 2. from the Sentence; either Definitive, or Interlocutory, having the force of a Definitive.

32. Appeals from Grievances are always *in ſcriptis*; and muſt be interpoſed within 10 (or, as ſome ſay, 15) days, from the Grievance committed.

33. Appeals from the Sentence are generally *apud acta*, or *viva voce*, at the time when Sentence is pronounced; but may be *in ſcriptis*, within 15 days from the Sentence, if it be Definitive, or 10 days, if it be an Interlocutory.

34. In an Appeal from the Sentence, Letters Miſſive are demanded from the Judge *a quo*; which are tranſmitted to the Judge *ad quem*, to inſtruct him in

 the

the nature of the Suit. Such Letters Miſſive are called, in the Civil Law, APOSTOLI.

35. In an Appeal, whether from a *Gravamen* or the Sentence, an INHIBITION is iſſued from the Superior Court to the Inferior, to ſtop Proceedings.

36. If after Inhibition iſſued, or Appeal from the Sentence, the Judge *a quo*, or party obtaining Sentence, ſhall *attempt* any act, in prejudice to the Appellant, or the Appeal; they may both be proceeded againſt *in cauſa Attentationis*.

37. Appeals muſt regularly be finiſhed within one Year, called *Primum Fatale:* But ſometimes a ſecond Year, called *Secundum Fatale*, is allowed.

38. The Time of one or two Years, allowed by Law for the determination of Appeals, is called *Terminus Juris:* In caſe a ſhorter Time is appointed by the Judge, that Time is called *Terminus Hominis*.

39. In CRIMINAL Cauſes of Eccleſiaſtical Cognizance, the Methods of Proceeding are 1. by INQUISITION; *ex Officio mero*. 2. by DENUNCIATION; or Preſentment of Churchwardens. 3. by ACCUSATION; *ex Officio promoto*.

40. The Courſe of Proceeding in the COURTS of the TWO UNIVERSITIES is by Citation, Libel, &c. And the Trial is, not by Jury, but by Examination of Witneſſes, Informations, &c.* as in the Eccleſiaſtical and other Courts of CIVIL LAW.

* See Appendix, No. IV. V. VI.

CHAP.

CHAP. XII.

Of PUBLIC JUDGMENTS.

Inſt. Lib. IV. Tit. 18.
Hoppii *Comm.* Lib. IV. Tit. 18.
Heinecc. *A. R.* Lib. IV. Tit. 18. pr. § 1—10. 45—80.
——— *El. J. C.* Lib. IV. Tit. 18.
Wood's *Inſt. of Civ. Law.* B. III. Ch. 10. B. IV. Ch. 4.
Eſprit des Loix. Liv. VI. Ch. 11. 14. 15. 17—20. Liv. VII. Ch. 10. 11. 13. Liv. XII. Ch. 5—20.
Wood's *Inſt. of Laws of England.* B. III. Ch. 1. 3. B. IV. Ch. 5. art. 11. 12.
Blackſtone's *Comm.* B. I. Ch. 15. B. II. Ch. 3. B. III. Ch. 8. B. IV. Ch. 1. 4. 6. 9. 10. 11. 12. 14. 15. 17. 29.
Principles of Penal Law. Ch. 3—9. 12. 14. 15. 18—21.

1. PUBLIC OFFENCES, otherwiſe called Crimes or Miſdemeſnors, were puniſhable, among the Romans, by the Laws concerning Public Judgments.

2. PUBLIC JUDGMENTS were thoſe, which related to Crimes, declared to be Public by ſome Law; and might, regularly, be proſecuted by any one of the Roman People, though not particularly intereſted in the proſecution.

3. Public Judgments anſwer to what in England is called CROWN LAW, where the Proſecution is in the name of the King; the Suits, ſo proſecuted, being called *Pleas of the Crown.*

4. Public Judgments were diſtinguiſhed from PRIVATE 1. in their Inſtitution. 2. in their Exerciſe.

5. Beſides Public Judgments, there were others, which were 1. Extraordinary. 2. Popular.

6. EXTRAORDINARY JUDGMENTS were thoſe relating to Crimes, concerning which no Law was enacted, or no certain Penalty was preſcribed. The Crimes, ſo circumſtanced, were called Extraordinary.

7. POPULAR JUDGMENTS were thoſe, in which the Mulct or Penalty inflicted was applied to the private uſes of any Actor that would ſue for it.

8. Of Public Judgments, ſome were 1. CAPITAL; in which the Puniſhment preſcribed was Death; which Death was (1) Natural; ſuch as took away the Life of the Criminal. (2) Civil; ſuch as took away his Liberty, or his Citizenſhip. 2. NOT-CAPITAL; in which the Puniſhment preſcribed was ſhort of Death, Natural or Civil.

9. Puniſhments of Natural or Civil Death were called Capital: others, ſhort of Natural or Civil Death, were called Not-Capital.

10. The Modes of inflicting Natural Death were 1. Hanging. 2. Precipitation from a Rock. 3. Beheading. 4. Strangulation. 5. Burning alive. 6. Crucifixion, called *Servile Supplicium*. 7. *Damnatio ad Furcam*. 8. *in Gladium*. 9. *in Beſtias*. The Dead Body of the Criminal was ſometimes diſſected, or hung in Chains: but, generally, was buried, after leave obtained from the Prince.

11. Civil Death was 1. Slavery. 2. *Damnatio in Metalla*. 3. *in opus Metalli*. 4. Baniſhment: (1) by Interdiction of Fire and Water: (to which *Abjuration of the Realm* in England had formerly a reſemblance) (2) by Deportation.

12. To Capital Puniſhments Confiſcation, or Forfeiture of Goods, was incident: But this was remitted by the later Emperors, in all Crimes under the degree of Treaſon.

13. Not-Capital Puniſhments were 1. Corporal: as Whipping, Fuſtigation, Stigmatizing. 2. Taliation. 3. Relegation. 4. Infamy, 5. Pecuniary Fines.

14. Impriſonment was no legal Puniſhment among the Romans; and was not, regularly, allowed, unleſs the *Reus* had *confeſſed* the Crime, with which he was charged. The Roman Priſon conſiſted of two parts: 1. *Robur*. 2. *Tullianum*. The Keepers of the Priſon were

were three, called *Triumviri*, or *Treſviri Capitales*; under whom was an officer, named *Commentarienſis*.

15. Puniſhments in England are 1. Death; which, unleſs in very atrocious Offences, is uſually inflicted by Hanging. 2. Forfeiture of Lands, or Goods, or both: and Corruption of Blood. 3. Corporal, ſhort of Death: as Whipping, Mutilation, Branding, Setting in the Pillory or Stocks. 4. Baniſhment; temporary or perpetual. 5. Impriſonment; temporary or perpetual. 6. Pecuniary Fines.

16. Public Judgments, among the Romans, were I. *Lex Julia* MAJESTATIS. II. *Lex Julia de* ADULTERIIS. III. *Lex Cornelia de* SICARIIS. IV. *Lex Pompeia de* PARRICIDIIS. V. *Lex Cornelia de* FALSIS. VI. *Lex Julia de* VI PUBLICA ET PRIVATA. VII. *Lex Julia de* PECULATU. VIII. *Lex Flavia de* PLAGIARIIS. IX. *Lex Julia* REPETUNDARUM, *de* AMBITU, *de* ANNONA, *de* RESIDUIS.

17. I. *Lex Julia* MAJESTATIS was a Law, promulged by Julius Cæſar, and again publiſhed, with additions, by Auguſtus, comprehending all the Laws before enacted to puniſh Tranſgreſſors againſt the State.

18. MAJESTAS denotes the Sovereign Authority of a State, whether lodged in one perſon or more. Whatever was attempted in violation of ſuch Authority was called *Crimen* LÆSÆ MAJESTATIS, *or* TREASON.

19. Treaſon was further diſtinguiſhed into 1. *Crimen Perduellionis*. 2. *Crimen Læſæ Majeſtatis in ſpecie*.

20. *Perduellio* was, whatever was attempted directly againſt the Being or Safety of the Republic, or of the Prince, or his Miniſters.

21. *Læſa Majeſtas in ſpecie* was, whatever was attempted indirectly againſt the Dignity and Prerogative of the Republic, or Prince.

22. Leſe Majeſty could not properly be committed *by* any but Subjects; nor *againſt* any but thoſe, in whom the Supreme Power reſided.

 23. The

23. The Puniſhment of Perduellion was 1. *Ultimum Supplicium*, or Natural Death of the Criminal. 2. Condemnation of his Memory. 3. Forfeiture of his Lands and Goods; which Forfeiture had relation to the time of the Fact committed. 4. Excluſion of his Sons from Honours and Succeſſions. The Puniſhment of Leſe Majeſty, ſpecifically ſo called, was Natural Death, or Deportation, or Relegation; according to the circumſtances of the Crime.

24. In England, the Law, by which thoſe Offences are defined that more immediately affect the Perſon of the King, his Crown, or Dignity, and are diſtinguiſhed by the name of HIGH TREASON, is the Statute of 25 Edward III. The ſpecies of High Treaſons, created by ſubſequent Statutes, are chiefly ſuch as relate 1. To Papiſts. 2. To the Proteſtant Succeſſion.

25. The Puniſhment of High Treaſon, in Males, is to be 1. Hanged. 2. Embowelled. 3. Beheaded. 4. Quartered. And, in Females, to be Burned alive. In this Judgment is implied 1. Forfeiture of the Offender's Goods, and Lands; which Forfeiture of *Lands* has relation to the time of the Fact committed. 2. Corruption of Blood.

26. The Proviſions, made by the Laws of England, to prevent oppreſſion in the Proſecution, and defect of certainty in the Proof, of High Treaſon; enumerated.

27. MISPRISION *of Treaſon* is the Knowledge and Concealment of it, when committed by others; without any Aſſent to the Crime. The Puniſhment of this Offence, by the Civil law, was the ſame as that of Perduellion: but by the Law of England is 1. Forfeiture of Goods. 2. Loſs of the Profits of Lands during life. 3. Perpetual Impriſonment.

28. APOSTASY and HERESY were conſidered, in the Roman law, as Treaſons againſt Heaven; the Proſecution of which, like that of Treaſon againſt the State,

State, might be commenced after the Death of the Offender, and Judgment given againſt his Memory.

29. The Puniſhment of Apoſtaſy, in England, was formerly Death: but, by the 9 & 10 W. III. is now, for the firſt offence, Incapacity; and for the ſecond, Incapacity, and three Years Impriſonment.

30. The Puniſhment of Hereſy, by the Common law of England, was Death, in conſequence of the Writ *de Hæretico comburendo:* But that Writ is now aboliſhed: and Hereſy in all its kinds, ſave one, (denying any one of the PERSONS in the HOLY TRINITY to be GOD, or maintaining there are more Gods than ONE, which, by the 9 and 10 W. III. is liable to the ſame penalties as Apoſtaſy) is ſubjected to Eccleſiaſtical Correction only.

31. II. *Lex Julia de* ADULTERIIS was made to puniſh 1. the Crime of ADULTERY. 2. the *Crime againſt Nature.* 3. INCEST. 4. *Stuprum.*

32. ADULTERY, by the Julian law, was the Violation of a Woman, who was married to another Man.

33. The Puniſhment of Adultery was 1. Relegation. 2. Confiſcation of half the Goods of both the parties. 3. Confiſcation of half the *Dos* of the Adultereſs.

34. By a Conſtitution of the Emperor Conſtantine, the Adulterer and the Adultereſs were both to be put to Death. Juſtinian changed the puniſhment of Death, on the part of the Woman, to that of Fuſtigation, together with confinement in a Monaſtery; which confinement, unleſs the Huſband took her again within two years, was for Life.

35. A Father, who ſurprized his Daughter in Adultery, might kill the Adulterer and his Daughter too. A Huſband, who ſurprized his Wife in Adultery at his own Houſe, or after three Warnings, might kill the Adulterer, but not his Wife. In England, the Killing of an Adulterer, taken in the Act, by the Huſband, is Manſlaughter only, and not Murder.

36. Adultery, as a Public Crime, is puniſhable, in England, in the Eccleſiaſtical Courts. In the Temporal Courts it is regarded as a Private or Civil Injury; for which the Huſband has ſatisfaction in Damages, by an Action of Treſpaſs *vi et armis* againſt the Adulterer.

37. The *Crime againſt Nature* was puniſhed by the Civil, as it alſo is by the Engliſh, laws, with Death.

38. INCEST between perſons in the Right Line, was puniſhed with Deportation: between perſons in the Collateral Line, the puniſhment was arbitrary. In England, this Offence, like that of Adultery, is puniſhable in the Eccleſiaſtical Courts.

39. *Stuprum* was the Violation of a Widow or Virgin of character, without Force.

40. The Puniſhment of *Stuprum*, in perſons of rank and conſideration, was the confiſcation of half their Goods: In meaner Perſons, it was Corporal, with Relegation.

41. The Profeſſion of a Proſtitute, though eſteemed infamous among the Romans, was not obnoxious to legal Cenſures.

42. III. *Lex Cornelia de* SICARIIS was a Law, enacted by L. Cornelius Sylla, the Dictator, to puniſh 1. the crime of HOMICIDE. 2. the crime called VENEFICIUM.

43. HOMICIDE, or taking away the life of a Human Creature, is 1. CRIMINAL. 2. NOT CRIMINAL; which is 1. CASUAL. 2. NECESSARY. 3. CULPABLE.

44. CRIMINAL Homicide, otherwiſe called Murder, is the taking away of the life of a Human Creature, with deliberation and malice: The Puniſhment, by the Roman and Engliſh Laws, is Death.

45. The wilful Killing of a man's SELF was not conſidered in the Roman law, as Criminal: In the law of England, it is Felony; and puniſhed by Ignominious Burial, and Forfeiture of Goods.

46. CA-

46. CASUAL Homicide is that, which is occaſioned *per Infortunium*, or by Miſadventure.

47. NECESSARY Homicide is that, which is committed 1. *Se Defendendo*, or in ſelf-defence. 2. for the prevention of ſome forcible Crime.

48. Caſual and Neceſſary Homicide were not obnoxious to Puniſhment, by the Roman law. In England, the killing of another *per Infortunium*, or *Se Defendendo*, is called EXCUSABLE Homicide, and puniſhed with Forfeiture of Goods; which is remitted of courſe. The killing of another for the prevention of ſome forcible Crime is called JUSTIFIABLE Homicide, and is not liable to any Puniſhment.

49. CULPABLE Homicide is that, which is committed without Malice, and through a ſudden heat; which the Law imputes to human infirmity. The puniſhment was arbitrary.

50. Culpable Homicide, called in the law of England MANSLAUGHTER, is Felony; but *with* the Benefit of Clergy, except in the caſe of STABBING.

51. VENEFICIUM is the crime of ſelling Poiſon, or of practiſing Magical Arts and Incantations; with a view of taking away the Life of a Human Creature. The Puniſhment was Death.

52. Witchcraft and Sorcery were formerly conſidered, in the law of England, as Hereſies and Felonies; and were puniſhed with Death. But all Proſecutions for theſe offences are now prohibited; and the Pretenders to Preternatural Arts are puniſhable by Impriſonment and the Pillory.

53. IV. *Lex Pompeia de* PARRICIDIIS was a Law enacted, or rather reſtored, by Pompey the Great, againſt that ſpecies of Criminal Homicide, which was committed on Parents and Children, and on thoſe who are *in the place* of Parents and Children. The Puniſhment was Sewing the Criminal, together with certain other animals, in a Sack, and throwing them alive into the Sea.

54. In England, there is an aggravated ſpecies of Murder, called PETIT TREASON; committed, where a Servant kills his Maſter, a Wife her Huſband, or an Eccleſiaſtic his Superior: the Puniſhment of which, in Males, is to be Drawn and Hanged; and in Females, to be Burned alive. But Parricide, as ſuch, is not ſubjected to any extraordinary penalty.

55. V. *Lex Cornelia de* FALSIS was enacted to puniſh the Fraudulent Suppreſſion or Imitation of Truth, to the prejudice of another.

56. The *Crimen Falſi* might be committed 1. by Words. 2. by Writing. 3. by Deed.

57. The *Crimen Falſi* was committed by Words, in the caſe of bearing Falſe Witneſs. Perjury, when committed in a court of Juſtice, upon a capital accuſation, was not comprehended under the Law *de Falſis*; but was included, as a ſpecies of Aſſaſſination, under the Law *de Sicariis*. In England, Perjury, and Subornation of Perjury, are, in all caſes, puniſhed by Infamy, Impriſonment, and, ſometimes, Tranſportation.

58. The *Crimen Falſi* was committed by Writing, in the caſe of making, altering, or ſuppreſſing a Teſtament, or other Inſtrument. The fraudulent making, or altering, of a Writing, to the Prejudice of another, in England, is called FORGERY; the Penalty of which is now, generally, Death.

59. The *Crimen Falſi* was committed by Deed, 1. in the caſe of counterfeiting or adulterating the Public Money. 2. a Suppoſititious Birth. 3. Falſe Weights and Meaſures. 4. Selling or Mortgaging the ſame Thing to two Perſons in two ſeveral Contracts. 5. Supporting the Law Suit of another by money, witneſſes, or patronage; called, in the law of England, MAINTENANCE.

60. The Ordinary Puniſhment of the *Crimen Falſi* was Deportation in Free-men, and the *Ultimum Supplicium* in Slaves: But in many caſes, it was arbitrary. In the caſes of counterfeiting or adulterating the Public

Public Money, (which in England is a ſpecies of High-Treaſon) and of a Suppoſititious Birth; the Puniſhment was Death: inflicted, in the former inſtance, by Burning alive.

61. VI. *Lex Julia de* VI PUBLICA ET PRIVATA was enacted to reſtrain Public and Private FORCE. PUBLIC Force was that which was committed with *arms*, in violation of the public peace: The Puniſhment was Deportation. PRIVATE Force was committed without arms: and puniſhed by Confiſcation of a third part of the Eſtate of the Offender, and Infamy.

62. To Public Force was referred the *Crimen* RAPTUS, or the Forcible Abduction of a woman of character, for the ſake of Luſt. The Puniſhment was Death in the Raviſher, and his Aſſiſtants; together with Confiſcation of the Raviſher's eſtate.

63. Inſtances of public Force, in England, are Offences againſt the PUBLIC PEACE: As 1. Riotous Aſſemblies, to the number of twelve: the Puniſhment is Death. 2. Affrays. 3. Unlawful Aſſemblies, Routs, and Riots. 4. Forcible Entry and Detainer: all puniſhed by Fine and Impriſonment. 5. Going unuſually Armed: the Penalty for which is Forfeiture of the Arms, and Impriſonment.

64. The Forcible Abduction, and Marriage or Defilement, of an HEIRESS, in England, is Felony, without Clergy. For Stealing, or Deflowering of a Woman Child, under the age of Sixteen years, the Penalty is Impriſonment and Fine. RAPE, or the carnal knowledge of a woman, forcibly, and againſt her conſent; or of a woman child, under the age of Ten years, even with her conſent; is Felony, without Clergy.

65. An Inſtance of Private Force, in the law of England, is CHAMPERTY: which is a bargain with the Plaintiff or Defendant in a Suit, to have part of the land, debt, or other thing ſued for, if the party pre-

prevails at law; upon which the *Champertor* carries on the ſuit at his own expence.

66. VII. *Lex Julia de* PECULATU was enacted 1. to puniſh the Crime of *Peculatus*. 2. SACRILEGE.

67. PECULATUS is 1. the imbezzling of Public Money, belonging to the Commonwealth, by one to whoſe adminiſtration ſuch money had not been committed. 2. the altering and removing of the Books, containing the Form and Terrars of Private Lands. The Puniſhment was, in Magiſtrates and their Accomplices, Death: in private perſons, Deportation; and, ſometimes, Reſtitution of fourfold.

68. SACRILEGE is the ſtealing of a *Res Sacra* or *Religioſa* from a ſacred or religious place. The Puniſhment was Death; but ſometimes a lighter penalty was inflicted.

69. Imbezzling the Public Money is puniſhed, in England, by Fine and Impriſonment only. Sacrilege, or robbing the ornaments and goods of a Church, was diſtinguiſhed by the Common Law from other Robberies; but by Statute it is put on the ſame footing with Felonies, denied the Benefit of Clergy.

70. VIII. *Lex Flavia de* PLAGIARIIS was made to puniſh the Crime, called PLAGIUM: by which was meant the fraudulent abduction, theft, or concealment of a Freeman, or of a Slave belonging to another. The Puniſhment was formerly pecuniary: afterwards it was arbitrary, and, in ſome caſes, capital.

71. *Plagium* is called, in the law of England, KIDNAPPING; being the forcible ſtealing, or decoying away, of man, woman, or child, from their own country, and ſending them into another. The Penalty is Fine, Impriſonment, and other corporal Puniſhment.

72. IX. *Lex Julia* REPETUNDARUM, *de* AMBITU, *de* ANNONA, *de* RESIDUIS, was made to puniſh the ſeveral Crimes, comprehended under thoſe appellations.

73. *Crimen*

73. *Crimen* REPETUNDARUM, or BRIBERY, was committed, when Magiſtrates, or perſons in any public office, received money, by themſelves or their domeſtics, to do ſomething *more* or *leſs* than their office obliged them to. The puniſhment was Reſtitution of fourfold; and ſometimes Baniſhment, and Confiſcation of Goods.

74. Bribery in England is, when a Judge, or other perſon concerned in the adminiſtration of Juſtice, takes a reward, to influence his behaviour in his office. The Penalty is Fine and Impriſonment.

75. AMBITUS is the unlawful buying and ſelling of any Public Office, or the procuring of Honours and Dignities by Money or Gifts. The Puniſhment was a Pecuniary Fine, and Infamy; and ſometimes, Deportation, and Reſtitution of fourfold.

76. In England, the buying of Offices, which concern the King's Revenue, and the execution of Juſtice; and corrupt Elections and Reſignations in Colleges, and other Eleemoſynary Corporations; are reſtrained by certain Statutes. The corrupt Preſentation of any one to an Eccleſiaſtical Benefice is called SIMONY; by which that Turn is forfeited to the Crown.

77. *Crimen de* ANNONA *(Fraudata)* is the abuſing of the Public Markets or Fairs, by which the Price of Proviſions was made dearer. The Puniſhment was a Pecuniary Fine, and other extraordinary animadverſion.

78. Offences, relative to the buying of Proviſions, are chiefly comprehended, in England, under the articles of 1. Foreſtalling. 2. Regrating. 3. Engroſſing: The Penalty in all which is Fine and Impriſonment.

79. MONOPOLIES, and combinations to keep up the price of Merchandize, Workmanſhip, and Proviſions, were puniſhed, among the Romans, by Baniſhment, and Confiſcation of Goods. The Penalty, in England, is Fine, Impriſonment, and other corporal Puniſhment.

80. *Crimen*

80. *Crimen de* RESIDUIS is retaining the Public Money, or converting it to other uſes than thoſe to which it was deſigned, by a Magiſtrate to whoſe adminiſtration ſuch money had been committed. The Puniſhment was Reſtitution of the *pecunia Reſidua*, or money retained or converted, together with a third part of the ſum over and above, and Infamy.

81. The Mal-Adminiſtration of High Officers in Public Truſts is uſually puniſhed, in England, by the method of Parliamentary Impeachment, with Fine, Baniſhment, and perpetual Diſability.

82. The Puniſhments of the ſeveral Crimes, which have here been mentioned, did not all deſcend from the Laws, by which thoſe Crimes were made PUBLIC; but were, for the moſt part, appointed by the Conſtitutions of the later Emperors.

CHAP. XIII.

Of the FORM *of* PUBLIC JUDGMENTS, *or the courſe of proceeding in* CRIMINAL CAUSES; *and of* JUDGMENTS OF THE PEOPLE; *according to the Roman Law.*

Heinecc. *A. R.* Lib. IV. Tit. 18. § 11—33.
Wood's *Inſt. of Civ. Law.* B. IV. Ch. 4.
Eſprit des Loix, Liv. VI. Ch. 4. Liv. XI. Ch. 18.
Pettingal's *Enquiry into the Uſe and Practice of Juries among the Greeks and Romans.* London. 1769.
Wood's *Inſt. of Laws of England.* B. IV. Ch. 5.
Blackſtone's *Comm.* B. III. Ch. 23. IV. Ch. 21—32.
Principles of Penal Law. Ch. 25.

I.

1. THE power of Judging Criminal Cauſes, among the Romans, which at firſt belonged to the Kings, and then to the Conſuls, was committed next to an Extraordinary Officer, appointed by Commiſſion for the proſecution of each crime, whoſe general name was QUÆSTOR PARRICIDII.

2. Cri-

2. Criminal Cauſes were afterwards arranged under different heads, called QUÆSTIONES PERPETUÆ; and different Prætors were created, to each of whom was aſſigned one or more of theſe Queſtions, with power to judge the Crimes depending on them, during the year of his Magiſtracy.

3. Beſides the Prætor or Quæſtor, there were other perſons, aſſiſtant to him in Judgment; of whom the principal or chief was called JUDEX QUÆSTIONIS; and the reſt were named JUDICES SELECTI.

4. The regular number of Judges was 450; which was again diſtributed into Decuries, or Committees of Ten. Out of theſe a certain number was *ſelected*, for the trial of any particular crime; who ſat together with the Prætor, and gave their Verdict, as JURORS do in England.

5. A Judicial Enquiry into Crimes might ariſe 1. from Inquiſition. 2. Denunciation. 3. Accuſation. In England, Proceedings in Courts of Criminal Juriſdiction are 1. Summary, without the intervention of a Jury. 2. Regular, with the intervention of a Jury.

6. The conſtituent parts of a Criminal Cauſe, according to the form of PUBLIC JUDGMENTS, were, in order, theſe. I. VOCATIO IN JUS. II. POSTULATA FACULTAS DEFERENDI NOMEN. III. DELATIO NOMINIS, *ejuſque* RECEPTIO. IV. CITATIO REI. V. SORTITIO JUDICUM. VI. ACTIO PRIMA *ſive* ACCUSATIO. VII. PROOFS. VIII. DEFENSIO *et* LAUDATIO REI. IX. ACTIO SECUNDA *ſive* COMPERENDINATIO. X. MISSIO JUDICUM IN CONSILIUM. XI. SENTENCE. XII. EXECUTION.

7. I. VOCATIO IN JUS was a perſonal citation of the *Reus*, or perſon accuſed, by which he was commanded to appear and anſwer to a Crime, of which he was accuſed or ſuſpected.

8. In great offences, or where the Criminal had confeſſed the crime with which he was charged, the *Reus* was

was ſent to priſon; and might be ſeized, even within his own Houſe or Walls. In ſmall offences, he was ſuffered to go at large, giving Sureties for his appearance; or was committed to the cuſtody of a Soldier; or kept at the houſe of a Magiſtrate.

9. In England, the beginning of the Regular method of Proceeding, in Courts of Criminal Juriſdiction, is by ARREST: which is followed by COMMITMENT of the Offender to Priſon; unleſs, in bailable offences, he finds Securities for his appearance, by giving BAIL.

10. II. POSTULATA FACULTAS DEFERENDI NOMEN was the Accuſer's aſking of leave to *enter the name* of the Criminal, together with the Crime objected againſt him; on his own appearance and that of the *Reus* before the Quæſtor or Prætor.

11. Sometimes the *Reus* would inſtitute a croſs Accuſation of the Accuſer, in order that he might be ſet aſide as an infamous perſon. This croſs Accuſation was called *Anticategoria.*

12. If more accuſers than one appeared, a previous Judgment was neceſſary, in order to determine which ſhould be admitted to accuſe. This previous Judgment was called DIVINATIO.†

13. III. DELATIO NOMINIS was the entering of the name of the *Reus* on the roll of Criminals, by the Accuſer; he having firſt taken the Oath of Calumny.

14. RECEPTIO NOMINIS was the admiſſion of ſuch name by the Quæſtor or Prætor, in conſequence of being aſked by the Accuſer.

15. The manner of Accuſing Offenders in England is called their PROSECUTION: Which may be 1. upon a previous finding of the Fact by a GRAND JURY; either (1) from their own knowledge, in the way of Preſentment; or (2) upon a written Accuſation, in the form of an Indictment. 2. without ſuch pre-

† See the Oration of Cicero againſt Q. Cæcilius; in which the diſpute is, whether he or Cæcilius ought to be admitted to accuſe Verres, and which, for this reaſon, is intitled *Divinatio.*

previous finding, (1) by Information, at the ſuit of the King. (2) by Appeal, at the ſuit of a Subject.

16. IV. CITATIO REI was the ſummoning of the *Reus* to appear in Court, in order to a Trial, on a day, which had been before appointed by the Prætor.

17. If on the day appointed the *Reus* did not appear, Baniſhment was inflicted on him, in his abſence. If the Accuſer made Default, the name of the perſon accuſed was ſtruck from off the roll of Criminals.

18. In England, when an Offender is indicted in his abſence, PROCESS is iſſued, to bring him into Court: after which he is called upon by name to anſwer the matter of the Indictment; which is termed his ARRAIGNMENT. To this may be ſubſequent 1. the Standing Mute of the Priſoner. 2. his Confeſſion of the Fact; ſimply, or in the way of Approvement. 3. his Pleading to the Indictment.

19. The PLEA of a Priſoner to the Indictment is 1. a Plea to the Juriſdiction. 2. a Demurrer to the Indictment. 3. a Plea in Abatement. 4. a Special Plea in bar. 5. the GENERAL ISSUE, Not Guilty.

20. V. SORTITIO JUDICUM was the chuſing by Lot of ſuch a number out of the body of Judges, as the Law, on which the Accuſation was founded, had determined for the Trial of the Crime, objected to the *Reus*.

21. In England, after iſſue joined, the uſual method of TRIAL is by JURY: ſuch Jury being firſt Impanelled by the Sheriff, and *twelve*, out of thoſe whoſe names are returned on the Panel, being choſen by Lot.

22. When the number of Judges was completed, the Accuſer or the *Reus* had each the liberty of *rejecting* ſuch of the perſons ſelected as they diſapproved; in like manner as Jurors in England may be *challenged*, either on the part of the King or on that of the Priſoner, as they appear, when called, to be ſworn.

23. Challenges to the Jury in England are 1. to the

the whole Panel, called Challenges to the Array. 2. to particular Jurors, called Challenges to the Polls. Challenges to the Polls are 1. for Cauſe. 2. Peremptory.

24. After Rejection of any of the Select Judges, as many new ones were ſubſtituted in their place, as were wanting to complete the legal number. To this anſwers what is called in England ſtriking a *Tales*, or awarding a *Tales de circumſtantibus*; by which *ſuch* men, as were ſummoned on the firſt Panel, or are preſent in Court, are joined to the other Jurors, ſo as to complete the number of twelve.

25. VI. ACTIO PRIMA *ſive* ACCUSATIO was, what was urged by the Accuſer in a continued ſpeech, in order to prove and aggravate the crime alleged againſt the *Reus*.

26. VII. PROOFS were principally had 1. from Witneſſes: which were to be two in number at the leaſt. In England, one poſitive Witneſs is generally ſufficient to convict a Priſoner, except in caſes of Treaſon. 2. Inſtruments or Writings. 3. Confeſſions of Slaves, belonging to the *Reus*; which Confeſſions were extorted by the Rack. In ſome circumſtances, the *Reus* himſelf might be forced to a Confeſſion by Torture: but no ſuch proceeding is allowable by the Laws of England.

27. VIII. DEFENSIO *Rei* was, what was urged by the Advocates of the *Reus*, in order to elude or extenuate the charge of the Accuſer.

28. LAUDATIO *Rei* was, what was advanced by perſons of authority and credit, in favour of the character of the *Reus*.

29. In England, Witneſſes *for* the Priſoner are examined upon oath, in like manner as Witneſſes *againſt* him: But no Counſel is allowed a Priſoner, on a Trial upon the General Iſſue, with reſpect to matters of Fact, except in the caſe of Treaſon.

30. IX. ACTIO SECUNDA *ſive* COMPERENDINATIO was a ſecond recitation of the cauſe, made by each

each party, after an Adjournment of two days.* In ſome caſes, ſuch an Adjournment was not allowed.

31. X. MISSIO JUDICUM IN CONSILIUM was the ſending of the Judges out, after the evidence on both ſides was cloſed, in order to conſult about their Sentence. In England, after the proofs are ſummed up, the Jury withdraw, unleſs the caſe be very clear, to conſider of their Verdict.†

32. X. SENTENCE was pronounced by the Prætor, in conformity to the ſuffrages of the greater part of the Judges: and was either 1. AMPLIATIO, or an order for the rehearing of the cauſe, on a day appointed, for the ſake of more ample information. 2. ABSOLUTIO, or a diſcharge of the *Reus* from the ſame Accuſer, though not from the ſame Accuſation. 3. CONDEMNATIO, or the pronouncing of him Guilty.

33. In

* See the ſix Orations of Cicero againſt Verres; of which the firſt is called *Actio Prima*, and the other five are claſſed under the general name of *Actio Secunda*.

† The reſemblance between the *Judices Selecti* of the Romans and Engliſh Juries, in the ſeveral particulars mentioned in this chapter, is ſo ſtriking, as to render it extremely probable that the latter were derived from the former. Mr. Juſtice BLACKSTONE has taken notice of this circumſtance:* but his obſervation, I conceive, would have been better placed, had he inſerted it in his *fourth* Book, where he treats of the method of proceeding in the Courts of Criminal Juriſdiction, inſtead of his *third*, where he conſiders the purſuit of remedies by Action, in the caſe of Private Wrongs, or Civil Injuries. For in Private Judgments, or in the Trials of Civil Cauſes, among the Romans, there was no *ſelection* of Judges at all; but the Prætor generally appointed *one* perſon only to examine the Fact in queſtion: as appears, among other proofs, from the phraſe, *Prætor dabat* JUDICEM (in the ſingular number), and alſo from the Formula uſed by him on this occaſion, *C. Aquili*, JUDEX ESTO. And indeed in the very inſtance, from Aſconius on the *Verrinæ* of Cicero, to which the learned writer refers, the proſecution was not of a Civil but a Criminal nature; the accuſation of Verres being inſtituted for a Public Crime, the *Crimen Peculatus*; which therefore could not be tried according to the Form of Private, but of Public Judgments.

* See Blackſtone's *Comm.* B. III. Ch. 23.

33. In England, no Verdict can be given by a Jury, unleſs unanimous in their opinions. This Verdict is ſometimes 1. Special; where, on the facts ſtated, they *doubt* the matter of law, and leave it to be determined by the Court: but is uſually 2. General: (1) Not Guilty; which diſcharges the Priſoner for ever of the Accuſation, unleſs *appealed* of Felony within the time limited by law. (2) Guilty: upon which, or when the Priſoner has *pleaded* Guilty, he is ſaid to be CONVICTED.

34. The Conviction of a Priſoner, in England, is regularly followed by the JUDGMENT, or the pronouncing of the Puniſhment expreſly ordained by law. But Judgment is often *arreſted* by ſome intervening circumſtance: of which the principal is the BENEFIT OF CLERGY.

35. XII. EXECUTION of the Sentence was called *Animadverſio*, and was left to the care of the Prætor. In England, it muſt be performed by the legal officer, and in the manner the law directs.

36. Execution of the Sentence might be ſuſpended, 1. by the Interceſſion of the Tribunes or Conſuls. 2. by Appeal.

37. After Judgement of Death, or of Outlawry for a Capital Offence, in England, the ATTAINDER of a Criminal commences. But Judgment, and its conſequences, may be avoided, 1. by Falſifying or Reverſing the Judgement. 2. by Reprieve or Pardon.

II.

Heinecc. *A. R.* Lib. IV. Tit. 18. § 3. 34—45.

Blackſtone's *Comm.* B. IV. Ch. 19. 31.
Eſprit des Loix. Liv. XII. Ch. 19.

38. Beſides Public Judgments, there were alſo JUDGMENTS OF THE PEOPLE, called JUDICIA POPULI; which were held by the Romans, aſſembled at

at their *Comitia*, *Centuriata* or *Tributa*, and related both to Private and Public Cauſes.*

39. The conſtituent parts of a Cauſe, whether Civil or Criminal, when heard before the Roman People, were, in order, theſe. I. DIEI DICTIO. II. CITATIO REI. III. ACCUSATIO. IV. PROMULGATIO. V. DEFFENSIO REI. VI. POPULI *vel* PLEBIS SUFFRAGIA.

40. DIEI DICTIO was the notice given by a Magiſtrate, that he intended to impeach a certain Citizen, (whom he mentioned by name) of a certain Crime, before the People, on a certain day.

41. CITATIO REI was the ſummoning of the *Reus* to appear, according to appointment, on a day prefixed. If, through contumacy or conſcioufneſs of guilt, the *Reus* was abſent; an arbitrary Puniſhment was impoſed on him by the Magiſtrate, who meant to accuſe him.

42. ACCUSATIO was the charge brought againſt the *Reus* before the People, and repeated thrice. To this was added an Intimation, called *Anquiſitio*, of the Mulct or Puniſhment intended, which was aſſigned by the accuſing Magiſtrate at his diſcretion.

43. PROMULGATIO was the publiſhing of the Accuſation, together with the Mulct or Puniſhment propoſed, on three ſucceſſive Market-days, for the information of the People.

44. DEFENSIO REI was what was urged by the *Reus*, or by his Advocates, after the time of Promulgation was expired, in order to elude or extenuate the crime alleged againſt him. After which a day was fixed, on which the People were to aſſemble, in order to give their Judgment.

45. POPULI *vel* PLEBIS SUFFRAGIA were the Votes of the People or of the Plebeians, in the *Comitia*

* See the account of the Accuſation of P. Scipio Africanus before the Roman People, as related by Livy, in the 38th Book of his Hiſtory; which is illuſtrated not a little from this part of the Civil law.

Centuriata or *Tributa*; and given *per Tabellas*, in the manner uſed in paſſing a Law: by a majority of which the *Reus* was Acquitted or Condemned.

46. To theſe Judgments of the People, among the Romans, the Trial, in England, of great offenders, before the Lords, in conſequence of a PARLIAMENTARY IMPEACHMENT by the Commons, is, in ſome reſpects, ſimilar.

A P-

APPENDIX.

STATUTA QUÆDAM ACADEMIÆ CANTABRIGIENSIS.

N°. I.

Cap. xii. *De* LEGUM *Studioſis.*

QUI a primo in Academiam adventu LEGIBUS operam dabit, primum annum integrum INSTITUTIONUM lectioni domi ſuæ impendat; deinde Quinquennium totum Publicum Juris Profeſſorem audiat. Reſpondebit publice ſemel Profeſſori, aut alicui Doctori ejuſdem Facultatis, antequam fiat Baccalaureus Juris. Qui fuit ante Baccalaureus Artium, quatuor annorum ſtudio poterit Juris eſſe Baccalaureus, ſi ordine præſcripto reſponderit.

Cap. xiii. *De* LEGUM BACCALAUREIS.

HIC etiam Regium in Jure Profeſſorem audiat Quinquennium. Reſpondebit hoc tempore bis in ſuis ſcholis, Opponet ſemel; et cooptabitur Doctor.
Magiſter Artium, ſeptennium dans operam Legibus, et cæteris perfunctis quæ hic requiruntur, poterit cooptari inter Legum Doctores.

Cap. xiv. *De* LEGUM DOCTORIBUS.

DOCTOR Legum mox a Doctoratu dabit operam Legibus ANGLIÆ; ut non ſit imperitus earum Legum quas habet ſua patria, et differentias exteri patriique Juris noſcat.

N°. II.

N°. II.

Cap. xlii. *De* CANCELLARII *Officio.*

CANCELLARIUS poteſtatem habebit ad OMNES omnium Scholaſticorum atque etiam eorum Famulorum CONTROVERSIAS, Summarie, atque ſine ulla Juris ſolennitate præter illam quam Nos præſcribimus,* ſecundum JUS CIVILE et eorum Privilegia et Conſuetudines, tum audiendas tum dirimendas: ad Congregationes Graduatorum et Scholaſticorum convocandas: ad homines dignos Gradibus Scholaſticis ornandos, qui omnia munera Scholaſtica, his contenta Statutis, expleverint; et ad indignos rejiciendos ab iiſdem et repellendos: ad omnes eorum violatores puniendos: ad providendum præterea ut ſinguli Academiæ Miniſtri in ſuo officio ſe contineant; ignavos, graſſatores, rei ſuæ diſſipatores, contumaces, nec obedientes, Suſpenſione Graduum, Carcere, aut alio leviore ſupplicio, JUDICIO SUO, caſtigandos. Non licebit tamen Cancellario aliquem Scholarem exilio mulctare, aut aliquem Pileatorum aut Præfectorum Collegiorum incarcerare, abſque conſenſu majoris partis Præfectorum Collegiorum.—Quicquid Statutis Noſtris, vel Academiæ,† Cancellario faciendum attribuitur, in ejus abſentia, hoc idem à Procancellario fiat. Eidem Cancellario, cum conſenſu totius Academiæ, licebit Nova Statuta, ad eruditionis amplificationem et decori atque honeſti conſervationem inter Scholaſticos habendam, ſancire; ſic ut ea His Decretis Noſtris nihil detrahant aut officiant.‡

Cap.

* Some Copies read *præſcribemus.*

† *Vel Academiæ*; that is, by the *Old* Statutes of the Univerſity, before thoſe given by Q. Elizabeth.

‡ It hath been ſaid, that the 42d Statute, *De Cancellarii Officio*, gives a right to interpoſe in *Criminal* matters, or matters relating to correction and diſcipline, *only*: And that from the power, committed in this Statute to the Chancellor, of puniſhing Contumacy and ſome other Offences *Judicio ſuo*; as alſo from *immediate Impriſonment* being one of the Puniſhments allowed; (which, it has been pretended, may be executed *before* there *can* be an Appeal) it neceſſarily follows, that the Juriſdiction of the Chancellor is *final, in the firſt inſtance.* But it hath been anſwered, with equal truth and ſagacity, that the very firſt clauſe, *Cancellarius poteſtatem habebit ad* OMNES — *Scholaſticorum — Controverſias —* SECUNDUM JUS CIVILE *et eorum Privilegia et Conſuetudines, tum audiendas*

Cap. I. *De Ordinationibus Collegiis præſcriptis.*

STATUTA omnia, Compoſitiones et Conſuetudines, quæ Scripturis Sacris, Inſtitutis Noſtris, aut Iſtis Statutis* adverſari videbuntur, abrogata et reſciſſa ſunto; reliquis ſuo robore permanſuris.

Si quid dubii vel ambigui in Iſtis Statutis et Sanctionibus Noſtris oriatur; id per Cancellarium et majorem partem Præfectorum Collegiorum explicabitur et determinabitur: Quorum Determinationi et Interpretationi reliquos omnes cedere volumus.

No.

audiendas tum dirimendas — is alone ſufficient to prove, that the adminiſtration of *civil* as well as *criminal* Juſtice is here included. 2dly, that the words *Judicio ſuo* mean no more, than that in cauſes of *leſs moment*, and towards offenders of *inferior rank*, the Chancellor may proceed by his ſole judgment, or *ſingle authority*, without the concurrence of the Heads of Colleges: Or, that he may inflict on offenders *which* of the ſeveral cenſures mentioned in the Statute — *Suſpenſione Graduum, Carcere, aut alio leviore Supplicio* — he ſhall think fit, *at his diſcretion:* but by no art of conſtruction can be made to contain the ſenſe of *final determination*. 3dly, that it is not true, there can be no Appeal from a Sentence of *Impriſonment*, becauſe ſuch Sentence is to be executed *immediately*; for an Appeal may be made *apud acta* §, as in other Eccleſiaſtical Courts, which may *ſuſpend* the execution. Laſtly that, even ſuppoſing the 42d Statute to relate *merely* to criminal cauſes, it will not follow, from *no mention* being there made of an Appeal from the Chancellor's Sentence, that the *Omiſſion* in ſuch a caſe amounts to a *Prohibition*, and that Appeals in Criminal Cauſes are not allowed by the Statutes of the Univerſity: For the Powers given to the Chancellor are ſtill to be exerciſed, in conformity to the *Privileges* and *Cuſtoms* of the Univerſity; and the ſame clauſe, which impowers the Chancellor to judge *omnes Controverſias Scholaſticorum*, requires him alſo to judge *ſecundum* JUS CIVILE: Now the *Civil Law*, it is certain ||, allows Appeals in *all* Cauſes, Criminal as well as Civil.

* *Iſtis Statutis*; that is, the *New* Statutes of Q. Elizabeth.

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§ See Chapter IX. pr. 47. and Chapter XI. pr. 30. 33. of the Third Book of this Analyſis. The words of the Civil Law are expreſs: *Si* APUD ACTA *quis appellaverit, ſatis erit ſi dicat,* APPELLO. D. 49. 1. 2.

|| See the Note on Chapter X. pr. 32. of the Third Book of this Analyſis.

N°. III.

Cap. xlviii. *De* CAUSIS FORENSIBUS.

OMNES CAUSÆ et LITES, quæ ad Univerſitatis Notionem pertinent, tam PROCANCELLARII quam COMMISSARII Judicio ſubjiciantur: niſi Procuratores vel Taxatores Academiæ, aut eorum aliquis, vel Magiſter Artium, aut qui ſupra illum fuerit, alter litigantium ſit: Tunc enim *Procancellarii* SOLIUS erit Juriſdictio; niſi in Nundinis Sturbrigienſibus, et iis quæ ad feſtum Sancti Johannis Baptiſtæ apud Barnwell, tenentur. Finem autem accipiant *intra triduum*, ſi fieri poteſt; omni juris ſolennitate ſemota.

A SENTENTIA COMMISSARII ad PROCANCELLARIUM APPELLABITUR, intra viginti quatuor horas poſt latam Sententiam. A PROCANCELLARIO autem, ſive Lis coram eo *cæpta* ſit, ſive per Appellationem ad eum *devoluta*, ad UNIVERSITATEM Provocatio fiet, intra biduum a tempore latæ ſententiæ, et non poſt: ſuamque Appellationem *intimabit* Appellans ALTERI PROCURATORUM, intra triduum latæ ſententiæ. Ille vero ſtatim, nomine Academiæ, Judici *a quo Inhibebit*, Ne quid, pendente Appellatione, *attentare* vel innovare præſumat: prius tamen duobus ſolidis, Honorarii loco, ab Appellante acceptis; nec non viginti ſolidis apud eum depoſitis; Appellanti reſtituendis, ſi juſtam foviſſe cauſam probetur; vel in uſum Academiæ convertendis, ſi temere appellaſſe convincatur, aut ſi poſt *datos Judices* a perſecutione ceſſaverit, vel culpa ſua cognitio differatur. Cauſæ Appellationum ad Univerſitatem *ultra decem dies*, ſi fieri poteſt, poſt datos Judices, non protrahantur. Nec *ſecunda Appellatio* omninò admittatur.

Judices Delegati, tres ad minimum, nec plures quam quinque, pro qualitate cauſæ in omni Appellatione *dabuntur*; et ſententiæ majoris partis illorum ſtandum erit. Poteſtas autem *nominandi* Judices ſit penes *quinque* illos viros qui pro CAPITE illius anni conſtituti ſunt, et *duos* PROCURATORES. Et qui a majore parte iſtorum nominati fuerint, ad Regentes et Non Regentes deferentur, ſuffragiis ſuis *eligendi*, ſi placent eis: alioqui, mutatis uno vel altero, alii, eorum loco per dictos SEPTEMVIROS ſurrogati, proponentur eligendi: Et ſi hi quoque diſplicent, ſimiliter tertio fiet.

Quod

Quod ſi nec tertio loco poſiti eligantur, licebit dictis Septemviris, aut eorum majori parti, pro illa vice tantum, Delegatos Judices eligere et dare. Et ſi major pars Septemvirorum, vel in *nominandis* Judicibus, vel in *eligendis* illis, (quando Electio ad eos devolvitur) non conveniat; tunc plures numero prævalebunt, licet majorem partem vel æquam, habita ratione totius numeri, non efficiant.* N°.

* It hath been aſſerted, that the 48th Statute, *De cauſis Forenſibus*, (where an Appeal from the Sentence, both of the Commiſſary and the Vice-Chancellor, is expreſly given, and the manner of appealing is preſcribed) relates to *Civil* cauſes *only*, in which two parties are litigant.† But here again, the words in the beginning of the Statute, never afterwards reſtrained or limited, — OMNES *Cauſæ et Lites, quæ ad Univerſitatis notionem pertinent, tam Procancellarii quam Commiſſarii judicio ſubjiciantur* — are as *general* as any words can be, ſo as to comprehend Trials of *every ſort:* although it is not to be wondered, that the ſame Critics, who would confine *omnes Controverſias* in the 42d Statute to *Criminal* cauſes, ſhould alſo confine *omnes Cauſæ et Lites* in the 48th Statute to *Civil* cauſes only. 2dly, the Appeal *from the Commiſſary to the Vice-chancellor* is given in the ſame clauſe, and in the ſame manner, with the Appeal *from the Vice-chancellor to the Delegates:* and the words of the *Commiſſary's Patent* extend as well to Cauſes of Correction and Cenſure, as to Civil Cauſes. Now there can be no doubt, but that an Appeal lies *from the Commiſſary to the Vice-chancellor* in ALL Caſes.

The miſtake on this Subject ſeems to have ariſen, from imagining that the *expreſs* authority of Statute is required, to make good the claim to Appeals; whereas the Right ſtands entirely on the NATURE OF UNIVERSITY-JURISDICTION: In conſequence of which, there hath been an immemorial *Practice* of Appealing; ſuppoſed indeed and admitted in both the *old* and *new* Statutes, and authorized by the Preſcription of various Rules, for the exerciſes of it; but neither expreſsly commanded, nor prohibited in either.

See an excellent Pamphlet, (from whence the explanation of this Statute, *De Cauſis Forenſibus*, as alſo that of Statute the 42d, *De Cancellarii Officio*, inſerted in the Appendix N°. II. has been extracted) intitled, *The Opinion of an Eminent Lawyer concerning the Right of Appeal from the Vice-chancellor of Cambridge. By a Fellow of a College.* 2d Edit. 1751.

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† The *Title* of this Statute is certainly not ſufficient to ſupport ſuch an Aſſertion: at leaſt if the opinion of the celebrated VINNIUS, who is ſurely a competent judge on this occaſion, be at all regarded; and who has plainly declared, that, in *his* conception, *Cauſæ Forenſes* implied ſomething *more* than Civil Cauſes merely. That learned Civilian, in his uſeful work, intitled *Partitiones Juris Civilis*, (Lib. III. Chap. 17.) being led by his Subject

N°. IV.

SENATUS-CONSULTUM *ſive* GRATIA.

13 Feb. 1593.

CUM Academiæ Statuto *De Cauſis Forenſibus* cautum ſit, ut omnes Lites, ſi fieri poſſit, *intra triduum* terminentur, nec Cauſæ Appellationum *ultra decem dies*, ſi fieri itidem poſſit, poſt datos Judices, protrahantur: Uſu autem jam compertum ſit, quorundam *Malitia* factum eſſe, ut multæ Appellationes non tam bona fide quam vexandorum adverſariorum gratia ab hominibus litigioſis interpoſitæ fuerint: Idcirco, ut huic incommodo in poſterum omnino ſubveniatur, Placet vobis, ut unanimi Procancellarii, Doctorum, Magiſtrorum Regentium et Non-Regentium, auctoritate ſtatutum et decretum ſit, ut, in omni deinceps Appellatione, Pars Appellans, una cum Advocato, Patrono et Procuratore ſuo, ſtatim poſt Appellationem ſive a Commiſſario ſive a Procancellario factam, præſtet *Juramentum Corporale* coram Judice *a quo*, quod *in conſcientia ſua juſtam habeat cauſam Appellandi:* præterea etiam, ut, Appellatione a Procancellario ad Academiam facta, utraque pars, tam Appellans quam Appellata,* et utriuſque etiam partis Advocatus, Patronus et Procurator, ſimiliter Juramentum præſtent Corporale, quod *neque directe neque indirecte, neque per ſe neque per alium quempiam, Septemviros, apud quos poteſtas eſt Delegatos Judices nominandi, ſolicitent ad aſſignandum aliquem Delegatum, ſed ipſorum arbitrio talem nominationem libere permittent.* Et ut quæcunque Appellationes deinceps in quibuſcunque Forenſibus Controverſiis, ſive ab *Interlocutoria Sententia* ſive *Definitiva*, interponentur, eas *intra quadraginta dies*, proxime poſt Inhibitionem factam numerandos, quocunque impedimento non obſtante, Delegati Judices, virtute Juramenti ſui Academiæ præſtiti, terminare teneantur: Niſi forte per Appellantem ſteterit hujuſmodi dilatio; quo in caſu, irrita ſit Appellatio et pro *deſerta* habeatur.—Et, ut hoc Decretum Veſtrum pro Statuto habeatur, in libris Procuratorum infra decem dies immediate ſequentes inſcribatur? N°.

Subject to ſpeak of the *Office of Aſſeſſors*, informs us, that it conſiſts, among other particulars, *in Cognitionibus*; *id eſt*, as he himſelf explains his meaning, *in* CAUSARUM FORENSIUM *Quæſtionibus et Diſceptationibus*, SIVE CIVILES *ſint et Pecuniariæ*, SIVE *Publicæ et* CRIMINALES.

* By the *Pars Appellata* here is not meant the *Judex a Quo*, but the party who has got a Sentence in his favour. After an Appeal, the two parties in the cauſe, inſtead of being called *Actor* and *Reus*, are now denominated *Pars Appellans* and *Pars Appellata*. See Oughton's *Ordo Judiciorum*, Tit. 301. § 2.

N°. V.

SENATUS-CONSULTUM *ſive* GRATIA. 24 Oct. 1609.

CUM Statutis Academiæ noſtræ cautum ſit, ut Omnes Cauſæ in aliqua Curia Univerſitatis motæ, omni Juris ſolennitate ſemota et ſola Facti veritate inſpecta, debite terminentur *intra triduum*, ſi commode fieri poſſit; quæ quidem Statuta (inter alia) quilibet Advocatus, Procurator, et alii omnes ſeſe ad poſtulandum gerentes in Curiis prædictis, virtute Juramenti ſtricte tenentur obſervare: Quibus tamen non obſtantibus, jampridem omnes pene Lites, coram Procancellario et Commiſſario Univerſitatis noſtræ inceptæ, potius in triennium quam triduum prorogantur; in manifeſtam Privilegiorum et Statutorum noſtrorum violationem, Honoris et Juriſdictionis Academiæ ſcandalum et opprobrium, et Litigantium vexationem et diſpendium: Placet itaque vobis, ut ſubſequens ORDO in omnibus et ſingulis Cauſis poſthac in Curiis Univerſitatis motis ſeu movendis ſtricte obſervetur? viz.

Imprimis arctetur Reus, ſi poſſit apprehendi; ſi non poſſit, fiat *Citatio* peremptoria *Viis et Modis*. Reo capto, ſeu *bonis ſuis*, ex *primo Decreto*, ſalva cuſtodia cuſtodiatur, donec *fidem jubeat* coram Academiæ Regiſtrario vel ejus Deputato, ſe compariturum proximo *die Juridico* ex tunc ſequenti, et ſic poſtea quolibet, etc. Reo autem non comparente, ſtatim luant *Fidejuſſores* ſine favore.

Inſuper, *juxta tenorem Statutorum Academiæ* noſtræ*, Principales

* The words *juxta tenorem Statutorum Academiæ* refer to the *Old* Statutes of the Univerſity, ſuch as obtained before thoſe given by Q. Elizabeth in the year 1570: which Old Statutes, it is apprehended, are *ſtill* in force, ſo far as they do not *detrahere aut officere aut adverſari* thoſe of the Queen. The Paſſages alluded to out of the Old Statutes are: Principales Perſonæ Factum ipſum per ſe proponant: Actor, viz. primo per ſe ſuam proponat Actionem, Reus vero per ſe ſuam afferat Defenſionem. *De Advocatis in Auditione Cauſarum.* Again, Nec Defenſores nec Procuratores coram Cancellario vel ejus Commiſſario admittantur pro iiſdem, niſi perſonæ citatæ adverſa valetudine ſeu alia legitima cauſa ſint detentæ, quo minus in Judicium ſui præſentiam poterunt exhibere: De quo in principio coram Cancellario vel ejus Com-

cipales Perſonæ Factum ipſum per ſe proponant; viz. *Actor* per ſe ſuam *Actionem*, et *Reus* ſuam *Defenſionem:* nec *Defenſores* vel *Procuratores* admittantur pro iiſdem, niſi adverſa valetudine vel alia legitima cauſa per Dominum approbanda ſint detenti, quo minus in Judicio ſui præſentiam poterunt exhibere: De quibus in principio, coram Domino Procancellario vel Commiſſario vel Delegatis Judicibus, fidem faciat (*lege* faciant) Juramento; quo præſtito, et Cauſa utrinque declarata, et non ante, admittantur.

1. His omnibus ſic ut præcipitur factis et obſervatis, primo die Juridico detur Materia, ſive Facti *Declaratio*; fiat etiam *Litis Conteſtatio*; et præſtet Reus Juramentum *de fideliter Reſpondendo*; et moneatur ad ſubeundum Examen intra triduum: (niſi cauſæ ſint leviores et ordinariæ; in quibus Judex poteſt ſtatim tam Partes Principales quam Teſtes, ‖ ſi quos præſentes habeat, *publice* interrogare et examinare de veritate Facti; et, omni ſolennitate prorſus ſemota, cauſam ſtatim finaliter determinare.) Sed utcunque triduo elapſo, vel antea ſi fieri poſſit, habeat Actor *copiam Reſponſi*, ut videat an opus habeat ulteriori probatione; et ſciat, quod ultra ei faciendum habeat etiam *ad probandum in proximum:* et poſt triduum, exeat *Compulſorium pro Teſtibus.*

2. Secundo die Juridico veniat Actor paratus *ad probandum*; et *Teſtes* ‖ ſuos *producat*, ſi quos habeat. Teſtes Judex, in levioribus et ordinariis cauſis, poteſt, ut ſupra, *publice* interrogare de veritate Materiæ ſive *Allegationis*; et ſtatim cauſam finaliter determinare: Sin cauſa longior ſit, et altiorem examinationem requirat, habeat Reus biduum pro *Interrogatoriis*; et intra principium tertii diei et diem proximum Juridicum, examinentur Teſtes tam ſuper Materia Originali Actoris quam ſuper Interrogatoriis per Reum datis.

3. Tertio die Juridico *Publicentur dicta Teſtium* ‖, et *aſſignetur ad Sententiam in proximum*; et proximo feratur Sententia, niſi Reus velit *Excipere*. Si velit, detur Reo proximus *ad excipiendum:* quo die adveniente, *reſpondeat* Actor, ut ſupra Reus Actori, et præſtet Juramentum, et ſubeat Examen, ut

Commiſſariis fidem faciant Juramento: Quo præſtito, admittantur Defenſores ſeu Procuratores, juxta Conſuetudines et Statuta Univerſitatis, in Litem proceſſuri. *De Defenſoribus et Procuratoribus Litigantium.*

‖ It is very obſervable, that the word, *Teſtes*, is never here uſed in the ſingular number, but always in the plural; agreeably to the Civil Law, which requires *two* Witneſſes at leaſt, to make proof.

ut ſupra; et Reo detur *Terminus ad probandum in proximum*; et fiat, ut ſupra Actori.

4. Quarto die producantur Teſtes || Rei, ſi quos habeat; qui Juramento ſuſcepto moneantur examinari citra proximum: Reliquaque fiant per Judicem, vel in publica Teſtium examinatione, vel in concedendis alteri Interrogatoriis, quæ ſecundo die Juridico fiebant de Teſtibus Actoris.

5. Quinto die Publicentur dicta Teſtium || Rei, aſſignetur ad Sententiam proximo, et *ad Informandum interim.*

6. Sexto die feratur Sententia.

7. Septimo et ultimo, niſi interim ab altera parte *Appellatum fuerit*, mandetur Sententia *Executioni.*

Placet etiam vobis, ut quilibet Advocatus, Procurator ſive Cauſarum Defenſor, necnon quilibet Officiarius Curiarum Academiæ noſtræ, virtute Juramenti ſui Corporalis per eorum quemlibet præſtandi, præmiſſa omnia et ſingula ſtricte teneantur obſervare, priuſquam in ullis cauſis in poſterum in dictis Curiis movendis admittantur: Et ut iſte ORDO et hæc Conceſſio veſtra pro Statuto habeatur, et in libris Procuratorum infra decem dies jam proxime ſequentes inſcribatur?

N°. VI.

Juramentum PROCURATORUM *et* ADVOCATORUM *in* CONSISTORIO.

EGO A. B. ad iſta Sancta Dei Evangelia per me corporaliter tacta juro, quod Statuta, Privilegia et Conſuetudines Univerſitatis Cantabrigiæ approbatas pro poſſe meo fideliter obſervabo: Miniſtros dictæ Univerſitatis honorifice tractabo: Juriſdictionem ejuſdem nullo modo impediam, nec impedire volentibus ſeu volenti conſilium vel auxilium præſtabo: cæteris Statutis, de Advocatis mentionem facientibus, in ſuo robore duraturis.

Jurabis etiam, quod omnia et ſingula, contenta in Statuto per Univerſitatem facto viceſimo quarto die Octobris Anno Domini 1609, pro poſſe tuo obſervabis: Ita te Deus adjuvet, etc.

N°. VII.

Forms of SUPPLICATS, *&c. for the Degrees of* BACHELOR *and* DOCTOR *of* LAWS.

LL. B.

—— *Coll.* —— *Mens.* —— *Ann.*

1. SUPPLICAT Reverentiis Veſtris A. B. ut ſtudium ſex annorum in Jure Civili, in quibus ordinarias lectiones audiverit, (licet non omnino ſecundum formam Statuti) una cum omnibus Reſponſionibus, cæteriſque exercitiis per Statuta Regia requiſitis, ſufficiat ei ad Intrandum in eodem Jure.

C. D. *Prælector.*

At the time this *Supplicat* is offered to the *Caput* of the Univerſity Senate, there muſt alſo be preſented, in writing, under the hand and ſeal of the Maſter of the College concerned, or his Deputy, a Form to the following effect.

—— *College.* —— *Month.* —— *Year.*

" A. B. was admitted into this College on the —— day " of ——, in the year ——; has reſided the greater part " of nine ſeveral Terms; and has continued a Member of " the College for Six Years complete."

E. F. *Maſter*, or *Preſident*, or *Locum Tenens Cuſtodis.*

LL. D.

2. Supplicat Reverentiis Veſtris A. B. ut ſtudium quinque annorum poſt Gradum Baccalaureatus in Jure Civili ſuſceptum, [*or, if a Maſter of Arts*, ſtudium ſeptem annorum, poſtquam Rexerit in Artibus,] in quibus ordinarias lectiones audiverit, (licet non omnino ſecundum formam Statuti) una cum omnibus Oppoſitionibus, Reſponſionibus, cæteriſque exercitiis per Statuta Regia requiſitis, ſufficiat ei ad Incipiendum in eodem Jure.

C. D. *Prælector.*

A Caution Grace.

3. Cum A.B. unicam Oppoſitionem [*vel* unicam Reſponſionem ; *vel* unicam Oppoſitionem et unicam Reſponſionem ; *vel* duas Reſponſiones ; *vel* unicam Oppoſitionem et duas Reſponſiones] præſtare teneatur, antequam admitti poſſit ad Gradum Doctoratus in Jure Civili ; Placeat Vobis, ut dictum Exercitium [*vel* dicta Exercitia] differatur [*vel* differantur] in Terminum proxime ſequentem, ſub pœna Viginti Solidorum ; *vel* viginti quatuor Librarum et decem Solidorum ; *vel* viginti quinque Librarum et decem Solidorum ; *vel* quadraginta et novem Librarum ; *vel* quinquaginta Librarum] ciſtæ communi applicandorum [*vel* applicandarum] ; atque ut Ipſe interea vel in hac vel in alia Congregatione Admiſſionem ſuam obtineat.

This Caution Grace (not the *Supplicat*, which muſt always be ſigned by the College-Lecturer, and, as I apprehend, by him *only*) muſt be ſigned by nine Heads of Colleges, and alſo by the greater part of the Faculty, preſent in the Univerſity.


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